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No. _____

In the Supreme Court of the United States

DAVID L. GARRISON,

Petitioner,

v.

CASSENS TRANSPORT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court's test for breach of the union's duty of fair representation be enlarged or clarified so that employees working under collective bargaining agreements have a right to a fair and honest hearing in the grievance process; or should the test announced by the Sixth Circuit be used which focuses on whether the outcome was irrational?

2. Did the Sixth Circuit err by failing to apply the correct standard of review for a Rule 50 motion where the court failed to list or consider relevant facts advanced by the non-movant and failed to draw reasonable inferences in favor of the non-moving party?

3. Did the Sixth Circuit err in Garrison's case because it applied the wrong legal standard for breach of the duty of fair representation in the grievance process by relying on ***Airline Pilots Ass'n Int'l v. O'Neil***, which involved the decision to settle a strike; and in doing so, did the Sixth Circuit fail to use the correct legal standard for breach of the duty of fair representation in the grievance process as required by ***Hines v. Anchor Motor Freight, Inc.***?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner was the plaintiff in the District Court and respondent in the Court of Appeals. Respondent Cassens Transport Company is a private business corporation.

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STATEMENT OF JURISDICTION

The Sixth Circuit denied a timely filed petition for rehearing on September 5, 2003. App. 2a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

28 U.S.C. § 2191 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1291(c) and (d) and 1295 of this title.

STATUTORY PROVISIONS INVOLVED

Section 301 of LMRA, 29 U.S.C. § 185(a):

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to

the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Beginning in 1980, David Garrison was employed as a Carhaul truck driver in the automobile transportation business for Auto Convoy, Inc./Allied Systems Limited ("Allied"). Garrison was a member of Teamsters Local 327 which is affiliated with the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America (IBT). Local 327 is the exclusive bargaining representative. Local 327 and the employers are signatories to the National Master Automobile Transporters Agreement (NMATA) and the Central Southern Area Supplemental Agreement. ("the contract"). When disputes arise over the contract, they are submitted to the National Automobile Transporters Joint Arbitration Committee ("Arbitration Committee") or the National Joint Standing Seniority Committee ("National Seniority Committee"). The contract provides that:

> Seniority, including for fringe benefits, shall only be broken by discharge, voluntary quit, more than a seven (7) year lay off.... App. 36a.

Routinely automobile manufacturers transfer business traffic from one signatory company to another. As a result, Article 5, Section 4 and 5 of the contract address the seniority issues that arise under these circumstances. In 1992, the Arbitration Committee issued a decision to Cassens Transport Company involving the dovetailing of two separate seniority lists. App. 43a. At the hearing involving both Cassens Transport Company ("Cassens") and E & L Transport Company (E & L), Cassens asked for clarification on a seniority issue in what has become known as the "Avon Lake Decision of 1992." Cassens needed to know how long the company was obligated to hold seniority for an E & L driver

who was presently on leave of absence due to an on-the-job injury. The Arbitration Committee held that the employee on workers' compensation who elected to transfer to Cassens was to be dovetailed with the seniority list:

> With regards to the E & L employee on workers' compensation who has elected to transfer to Cassens, he is deemed as transferred and will hold seniority at Avon Lake and will be permitted to assume an active position upon his release from compensation status. App. 48a.

Under the contract, decisions by the National Arbitration Committee are final and binding. App. 39a. Once an employee's name is on a seniority list, it doesn't matter that the employee is not able to present himself for work. Seniority is not lost absent discharge, voluntary quit or more than seven year layoff.

In 1994, while Garrison was off work because of a work-related injury, Nissan Motors took Allied's traffic and assigned it to Cassens and/or Commercial Carriers. The Arbitration Committee held that Article 5, Section 4(c) was applicable, and accordingly, the Allied drivers were to keep their terminal seniority and Allied's seniority list was to be dovetailed with Cassens and Commercials seniority list at the Smyrna, Tennessee terminal. App. 7a and 8a. Garrison, and other drivers working for Allied, were notified that they could elect to follow the work to either Cassens or Commercial. Garrison, notified Allied and Local 327 that he elected to follow the work to Cassens. App. 9a. Garrison's election to follow the work to Cassens was acknowledged by Cassens' terminal manager, Jim Firkus, who signed Garrison's letter of election "received" on November 10, 1994. However, Firkus did not place Garrison's name on the seniority list as he

should have done as required by the Arbitration Committee and the Avon Lake Decision of 1992. App. 9a; and 48a.

In January of 1995, Local 327 appeared before the National Arbitration Committee in St. Petersburg, Florida and reported that the list of Allied employees who elected to follow the work to Cassens and Commercial was complete, and that all names had been dovetailed as ordered by the Arbitration Committee. App. 51a - 53a. Local 327 was wrong. Garrison's name was not on the Cassens' seniority list in January of 1995. There were other Local 327 members who were off work with work-related injuries and their names were dovetailed with the Cassens' seniority list. App. 55a - 58a, testimony of Neal; App. 59a - 62a., testimony of Nance.

In June, 1996, Garrison obtained a medical release from his doctor permitting him to return to work. That day he contacted Cassens and was told by the assistant terminal manager that his name was not on the seniority list. He subsequently spoke to Firkus, the terminal manager, and was again told that his name was not on the seniority list. Firkus stated he didn't remember ever being notified that Garrison wanted to follow the work to Cassens. Garrison then went to Nashville, Tennessee and spoke with Jimmy Neal, Local 327's business agent, and David Hodgin, the president of Local 327. App. 9a and 10a. Neal told Garrison that he would arrange for a meeting with terminal manager Firkus the next day so that Garrison could discuss with Firkus his return to work. The next morning, Neal left Garrison waiting at the motel for Neal to call him, while Neal met secretively with Firkus. When Garrison learned that Neal was meeting secretly with Firkus, he immediately went to Cassens' terminal. When he got there, Neal had already left. Upon his return, Firkus met with Garrison and Neal but would not agree to put Garrison back to work. App. 70a - 71a, testimony of Garrison.

The following day, Garrison obtained the letters signed by Firkus acknowledging Garrison's election to follow the work to Cassens. He confronted Firkus. Firkus stated that his signature was a forgery. Garrison offered to pay to have the letter examined by a handwriting expert. Firkus then admitted that it was his signature on the letter. App. 10a. Garrison filed a grievance stating that he properly notified Cassens of his election to follow the work. Neal told Garrison that his case was a "slam dunk." App. 10a. In June, 1996, a local hearing was held in Smyrna, Tennessee. At that time Joe Clark, Cassens' labor relations manager, falsely stated that Cassens was never notified of Garrison's desire to follow the work, and that Garrison didn't have a valid medical release. Garrison did have a proper medical release and had already obtained a DOT physical. He drove a tractor-trailer to the local hearing in Smyrna, Tennessee. App. 64a, testimony of Garrison.

Garrison's grievance was referred to the next level of arbitration and was docketed at the Southern Area Automobile Transporters Grievance Committee for hearing in August of 1996 in New Orleans, Louisiana. Garrison did not attend this proceeding because Neal said he would be there to represent Garrison and that his presence was not necessary. In New Orleans, Clark, on behalf of Cassens, presented to Neal a new claim that there was an alleged 30-day rule that caused the loss of Garrison's seniority. App. 11a. [1]

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[1] In the Avon Lake Decision of 1992, the Arbitration Committee required Cassens to place injured drivers on its dovetailed seniority list, irrespective of any time requirement. The contract guarantees that seniority can only be broken by discharge, voluntary quit, or layoff of more than 7 years. The Arbitration Committee at Avon Lake in 1992 stated the employee was deemed transferred and

After the New Orleans hearing, Neal did not tell Garrison of Cassens' new claim that there was an alleged 30-day rule that caused the loss of his seniority. The case was not resolved in New Orleans and was docketed for the November 5, 1996 proceeding before the National Seniority Committee in Dana Point, California. App. 11a, 12a.

In preparing for this final grievance hearing at Dana Point, California, Garrison focused exclusively on trying to prove that he notified Cassens of his intentions to follow the work and that he had a proper medical release. Neal led him to believe these were the claims Cassens was advancing to deny him the right to make a living on Cassens' list. Garrison forwarded to Neal prior to the Dana Point hearing a 10 page written statement with 28 exhibits. Neal reviewed the presentation and told Garrison that it was complete and that it was the best presentation he had ever seen. Nothing in the presentation, however, referred to the false 30-day rule Clark raised two months earlier in the August grievance hearing in New Orleans, Louisiana. App. 12a. When Garrison arrived at Dana Point, he met with Neal to discuss the case. Neal had not conducted any research in Garrison's behalf. At this point Neal had not provided Garrison with even one slip of paper to help Garrison with his case. Neither did Neal share with Garrison any strategy for his case. Neal withheld from Garrison Cassens's new strategy of using a secret 30-day rule to defeat his grievance, App. 12a., while at the same time Neal told Garrison that Garrison's grievance preparation was complete. Neal led Garrison to believe he had a "slam dunk".

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would hold his seniority until he recovered and could assume an active position with Cassens. App. 47a.

As Garrison and Neal were leaving the hotel at Dana Point, Clark walked up to Neal in the parking lot of the hotel and said "Jimmy I got some documents for Garrison's case." Neal took the documents and handed them to Garrison. Neal said "What do you think, Dave?" Garrison was dumbfounded that Neal would expect him to have an opinion about Committee decisions he had never seen or heard of before. He didn't know how they applied to his case. App. 65a - 69a, testimony of Garrison. Neal said nothing about the false 30-day rule to Garrison, even after the documents were handed to him at Dana Point. Garrison later read the Committee decisions advanced by Clark and felt that none of them applied to the dovetailing of a seniority list under Article 5, Section 4(c). Neal did not reveal Cassens' real motive for advancing the seven decisions, that it was the 30-day rule "contained" in the seven decisions which was Cassens' hidden agenda.

When the hearing started at Dana Point, Local 327 went first. Neal read "the cause" portion of Garrison's grievance, which Garrison had prepared, into the record. Garrison then read his ten page written statement. Garrison's written statement, of course, did not address the false 30-day rule. App. 12a. The employer went next and Clark argued on behalf of Cassens that Garrison did not comply with the alleged 30-day rule. Clark handed the National Seniority Committee members seven written Committee decisions. Clark testified that Cassens didn't have any obligation to Garrison "under the procedures and decisions previously rendered by the committee." App. 13a. Clark repeatedly blamed Local 327 for telling this Committee in January of 1995 that the list was complete. Clark argued that it was the local union's fault Garrison's name was not on the list. App. 51a - 53a.

After Cassens presented its case, Local 327 was given the opportunity to rebut Cassens' case, but Neal completely failed to say anything coherent. Neal said nothing about what he knew to be true. Neal didn't point out that other Local 327 employees who were off on workers' compensation status did not lose their seniority after 30 days. Neal failed to say he knew there was no 30-day rule in the contract that applied to terminal seniority. Neal let Cassens' fake 30-day rule go unchallenged. Garrison tried to put forth the only argument in his defense by stating that he didn't believe any 30-day rule applied, and that his seniority rights were protected under the contract. App. 12a and 13a.

After Garrison's attempt at rebuttal, one of the National Seniority Committee members asked Neal if he had anything to say on Garrison's behalf. Neal responded: "No sir, I don't, I think you've got the case." App. 13a, 14a. After Neal's lame response, Clark, on behalf of Cassens, more forcefully argued his fake 30-day rule, stating that Garrison lost all of his terminal seniority rights. Clark falsely claimed that prior National Seniority Committee decisions involving this same situation state that employees off work because of on-the-job injury lose their seniority. Clark never mentioned the Avon Lake Decision of 1992.[2] Cassens succeeded with the Committee because the union presented no evidence or argument, and had no interest in helping Garrison. Following the hearing, the National Seniority Committee decided that Garrison's terminal seniority was extinguished, holding that based on prior decisions of the Committee an employee has to make himself available to work within 30 days or lose his right to do so. App. 14a. The Committee decision effectively

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[2] The Sixth Circuit concluded that Avon Lake Decision of 1992 was the only relevant prior Committee decision. App. 14a, 15a.

exonerated Local 327 and Cassens of any wrongdoing. App. 79a - 80a.

Garrison brought suit in the District Court against Cassens for a breach of the collective bargaining agreement, and against Local 327 for breach of its duty to represent him. Prior to trial in the District Court, Garrison voluntarily dismissed Local 327. The case was tried to a jury in what is commonly called a hybrid 301 action, which requires that Garrison prove that the employer breached the contract and that the local union beached its duty of fair representation. App. 16a. The jury found in favor of Garrison and awarded Garrison $408,885 in compensatory damages, and allocated 75% of the fault to Cassens. The jury also awarded $500,000 in punitive damages against Cassens. The District Court denied Cassens' motion under Rule 50, stating in detail the evidence which showed Local 327 acted in bad faith and was arbitrary. App. 81a - 87a. The District Court entered a final judgment affirming the jury's verdict and ordered Garrison to be reinstated to his employment with Cassens. Cassens refused to put Garrison back to work and was found in Contempt by the District Court. Cassens appealed to the Sixth Circuit. The panel of judges assigned to the case reversed the District Court, holding that there was insufficient evidence that the local union's conduct was arbitrary, but offered no discussion or opinion as to conduct constituting bad faith. App. 26a and 27a.

REASONS FOR GRANTING THE PETITION

I. Review is Warranted to Clarify or Enlarge the Existing Standard for Breach of the Duty of Fair Representation so that the Right of the Employee to a Fair [3] and Honest[4] Hearing is not Violated, and so that the Finality Provisions of LMRA, Section 301 Operate as Congress Intended, Thereby Reducing the Need for the Employee to File a Federal Lawsuit.

Section 301 of the Labor Management Relations Act, 1947, (LMRA) provides for suit by employees in federal court for breach of contract. ***Hines v. Anchor Motor Freight, Inc.***, 424 U.S. 554 (1976). The collective-bargaining contract at issue contains procedures for the settlement of disputes through the grievance process. App. 40a. These provisions are among those which are to be enforced under §301 of the LMRA. ***United Steelworkers of America v. American Mfg. Co.***363 U.S. 564, 569 (1960). In the grievance process, the union may not refuse to press or only perfunctorily press the individual employee's claim. ***Humphrey v. Moore*** 375 U.S. 335 (1953).Where the union actually utilizes the grievance process on behalf of the employee, the focus is on whether the employer breached the contract and whether there is substantial reason to believe that the union's breach of duty contributed to the erroneous outcome of the grievance. The decision of a final arbitration committee is reviewable and vulnerable if tainted by a breach of duty on the part of the union. ***Hines***, at 568.

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[3] "Having the qualities of impartiality and honesty; free from prejudice, favoritism, and self-interest. Black's Law Dictionary, 5th Ed.

[4] "Free from fraud or deception: legitimate, truthful. Merriam Webster Dictionary

The grievance process cannot be expected to be error free. There will be occasional mistakes,

> "But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory; for in that event error and injustice of the grossest sort would multiply. The contractual system would then cease to qualify as an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract. Congress has put its blessing on private dispute settlement arrangements provided in collective-bargaining agreements, but it was anticipated, we are sure, that the contractual machine would operate with some minimum levels of integrity." ***Hines,*** at 571. (Emphasis added by Petitioner)

The union as statutory representative of the employee is always subject to complete good faith and honesty of purpose in the exercise of its discretion. ***Id.*** citing ***Ford Motor Co. v. Huffman*** 345 U.S. 330, 338 (1944). Oversight is necessary by federal courts in order to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. ***Id.*** citing ***Vaca v. Sipes***, 386 U.S. 171, 182 (1967).

This Court should determine under what circumstances the individual employee may obtain judicial review of his breach of contract claim where he has been denied relief to which he is entitled under the contract after grievance procedures are exhausted. In our case, the arbitration committee that decided Garrison's grievance was the National Seniority Committee. Its decisions, according to the contract, are final. For this Court to allow the bar of finality to foreclose employees from

asserting their individual claims for breach of contract, there must be a minimum level of integrity in the grievance process. Under this Court's prior decisions that minimum level of integrity is met where the union's conduct was not arbitrary, discriminatory or in bad faith. For over 40 years this test has been the threshold for removing the bar of finality. The test is crucial to the effective administration of LMRA as Congress intended.

The Sixth Circuit's permutation of this test is not workable. A focus on "extreme arbitrariness" or "totally irrational" in the context of a grievance hearing steers the court away from the goal. The focus must be on the mechanism used to enforce the contract. ***Hines*** at 571. The present incarnation of the test needs to be clarified or expanded to include a review of the process afforded the grievant in his grievance hearing. Cassens intentionally breached the contract and Local 327 did nothing to assist the employee in the grievance. But because the union was "merely negligent" according to the Sixth Circuit, there was no breach of the duty of fair representation. Under this standard, the employer may be guilty of grave misconduct by intentionally breaching the contract and yet not be responsible for damaging the employee because the union was not extremely arbitrary and irrational. Under this test, error and injustice of the grossest sort is allowed to occur. Without a fair and honest hearing, there is no way to enforce the contract and there is no minimum level of integrity in the process.

In its application of the test for breach of duty of fair representation, the Sixth Circuit makes much of its view that union representatives are not strictly held to the standard of attorneys. This appears to be the law in the Sixth Circuit. Presumably then the standard in the Sixth Circuit is that union representatives are held to the standard of a "reasonable

man." Under this standard, a reasonable person representing an employee in a grievance process could do absolutely nothing for the employee and be guilty of mere negligence. A reasonable person, according to the Sixth Circuit, withholds information needed by the grievant, and is guilty only of an "error of judgment." If that truly is the law, then the standard needs to be modified to focus on the process: Did Neal take reasonable steps to help Garrison have a fair hearing? If not, he breached his duty.

The union, as the employee's exclusive representative, is responsible to assure a fair and honest hearing. The employee is barred from wielding power himself in the grievance process, and must get help from the local union. The employee, pursuant to the contract, abrogates his individual rights to represent himself.

Petitioner suggests that the three part test for breach of duty of fair representation include analysis of whether the employee gets a fair and honest hearing. A fair and honest hearing requires at a minimum: (1) that the employee have access to essential information in the grievance process; (2) the contractual grievance procedures for the hearing must be followed; (3) the local union must advocate for the employee. This test focuses on the process, not magnitude of the blame for a wrong outcome. Petitioner analogizes this test to a three legged footstool. When all three legs are in place, the footstool is balanced and there is a fair and honest hearing, and the integrity of the process will be maintained. App. 89a - 92a.

The present permutation of this court's test leads to injustice where the union's failure to do anything (mere negligence?) results in a sham hearing by not assuring there is a fair and honest process. The phrase "mere negligence" has come to be a measure of whether the court believes a

union actually influenced the outcome. That is a factor, but it is a separate factor. The test should focus on the union's duty to facilitate the process rather than being a defacto inquiry into whether the merits were decided correctly. The test has degenerated to the point that union's and employers believe the courts will not seriously examine their actions and decisions. In the real world, the union believes it is free to do nothing to represent the employee and the employer can willfully and intentionally breach the contract. Judging by the Garrison case in the Sixth Circuit, they are correct. Under the Sixth Circuit's test, the local union is not even responsible to give the employee information in its possession that would help the employee win. Neal didn't inform Garrison of the reason advanced against him, or that other injured members of Local 327 were not held to a 30-day rule.

Cassens was involved in a prior grievance that resulted in the Avon Lake Decision of 1992. App. 43a. The Committee decided the exact same issue with respect to Cassens at Avon Lake in 1992 that arose in Garrison's situation in 1994. In the Avon Lake Decision of 1992, the Committee determined that employees on workers' compensation status retained their seniority until they were able to return to work. The Avon Lake Decision affirms the seniority protection guaranteed in the contract. In the Avon Lake Decision of 1992, Cassens was ordered to keep an employee on the seniority list. However, in 1994 Cassens refused to keep an injured man's name on the list: Garrison. Had Neal pointed out the Avon Lake Decision of 1992 to the National Seniority Committee, the result would have been different. (Compare 43a, 77a, and 122a) Because there was not a fair and honest hearing in Garrison's case in 1996 at Dana Point, the Avon Lake Decision of 1992 was not advanced.

Had the "Footstool of Integrity" (App. 89a) been in place prior to Garrison's hearing, he would have had a fair and

honest hearing and the minimum standards for a hearing would have been met. Had Neal shown any interest in representing Garrison, he could easily have found the Avon Lake Decision of 1992 after Clark advanced his fake 30-day rule in August, 1996. Garrison should have been informed of Avon Lake. Had Neal produced the Avon Lake Decision of 1992, the Committee members who decided Avon Lake would have agreed with Neal that the case was a "slam dunk." App. 122a.

Both the union and the employer have access to all prior National Arbitration Committee and National Seniority Committee Decisions with respect to seniority and other procedural issues that are essential in the grievance process. Local 327 members do not have access to prior Committee decisions. The local union in Garrison's case showed no interest in helping Garrison get this information, nor did the local union pay any attention to the position communicated by the company for denying Garrison's grievance. This assured that Garrison would not have a fair and honest hearing. Garrison suggests that the union breached its duty of fair representation when it failed to utilize or supply Garrison with necessary information that was in the hands of the local union (and the employer) and not available to the employee. At a minimum, this would include the reason Cassens denied his grievance, the names of other Local 327 members who were not denied employment based on a fake 30-day rule, and the Avon Lake Decision of 1992. Garrison did not have a fair hearing because basic information was withheld from him prior to and during the hearing.

In order to have a fair and honest hearing, the grievant must have notice of the charges against him. That is, the employee is entitled to know the company's position prior to the hearing. An employee who is blind-sided at a grievance hearing is the pre-determined loser because of his lack of

notice. The contract (NMATA) requires that the company provide notice to the employee as soon as possible of any Committee decision it plans to use to deny the employee's grievance. App. 40a. In August, 1996, two months after denying Garrison's initial grievance, Cassens, the employer, changed its position with respect to why his grievance was denied. Three months later, In November, 1996, Garrison was first given notice of Cassens' new defense/false 30-day rule. Garrison never learned Cassens claimed a fake 30 day rule was the basis for denial of his grievance until after Clark raised the issue in Cassens' rebuttal to Garrison's grievance at the Dana Point, California hearing. App. 67a - 69a. Garrison therefore did not get a fair hearing because the contractual grievance procedures were not followed. Not only did the union representative not object to late notice, the union representative actually had been informed of the reason for the denial of Garrison's grievance three months earlier but said nothing to Garrison. Garrison was not honestly represented at the hearing.

In order for the grievant to have a fair and honest hearing, the union representative must advocate for the employee. The record at Dana Point clearly establishes that Local 327, through Jimmy Neal, totally failed to advocate anything on behalf of Garrison. Neal said "I guess you got the case." Neal had no strategy or tactics. Neal said nothing about the clear language of the contract that protected Garrison's seniority. Neal helped negotiate the contract, and yet Neal chose not to make even a colorable argument in Garrison's behalf. Neal could have stood up after Clark advanced the fake 30-day rule and said: "I know Garrison. He can read. He read the contract. It guarantees that seniority can only be broken by discharge, voluntary quit, or more than a seven year lay off. I helped negotiate the contract language. You cannot deny this man a right to make a living based on some fake 30-day rule

that Cassens just made up. It violates the contract. Notice was never given that employees have 30 days to show up for work. Other Local 327 members who were off on workers' compensation status when the list was dovetailed did not lose their seniority from any fake 30-day rule." Instead of providing information in his possession, Neal responded "I guess you got the case." Neal did not even provide a "perfunctory" defense.

By his silence Neal gave a clear message to the National Seniority Committee: Garrison should lose. Neal's silence was heard by the National Seniority Committee. Neal was an insider. Neal negotiated the contract, and sat on several National Committees. While at Dana Point, he was a panel member at other arbitration hearings. Neal's silence was so loud the roar was deafening, and the message of that silence was heard clearly by all the members of the National Seniority Committee, "**Let Garrison lose**". App. 84a-86a. The record establishes that Garrison had no real advocate; he had no advocate other than himself at the grievance hearing. He was inexperienced, alone and crippled by a conspiracy of silence. Garrison did not have a fair and honest hearing because there was nobody at the hearing who was willing and able to advocate his case.

There was no need for Garrison's case to have gone to a federal jury trial. Had there been a minimum standard of integrity in the grievance process Garrison would have prevailed at a fair and honest hearing. Other members of this local union did not lose their seniority under the contrived rule by which Cassens denied Garrison his seniority. Absent a fair hearing, employees' rights are decided in secret without respect for the plain language of the contract and without regard for prior Committee decisions. Employees have little choice but to file suit. The lower courts have strayed from the intent embodied in the test laid down by this Court in ***Hines***.

In so doing, the lower courts have abdicated their duty of oversight and allowed the unions to abdicate their duty of fair representation. The result has been a concentration of power in the hands of the unions and employers.

The purpose of hybrid 301 law is to assure the integrity of the contract and to provide a way in which the employee who is wronged by breach of contract may be made whole. If the grievance process lacks integrity, injustice will result. When injustice results, the employee must seek redress in federal court. Employees will have to hire lawyers, and employees are going to have to pay for them. It is almost impossible to get an attorney fee award in a hybrid 301 action. The litigation is expensive and risky. In the real world employees are going to have to give up a large percentage of their recovery for breach of contract in order to retain counsel. If the case is not resolved in the grievance process, the best that the employee can hope for is to prevail in a complicated hybrid 301 action and lose a substantial amount of his recovery to pay attorneys fees. The companies under this contract know the real world situation for the employee and they use the inability to pay attorneys fees to beat down employees in disputes. Employees can only be made whole if the grievance process operates as intended under the contract.

A fair and honest hearing is required by contract and by law. The contract requires that all employees have the right to have their cases decided "fairly and promptly." App. 41a. By contract and by law, the local union is required to do a minimum of investigation, make an effort to ascertain the truth of the charges, and to present available evidence contradicting evidence presented by the company. ***Hines,*** at 558 and 571. In processing a grievance, the union can breach its duty to represent the employee where it handles the grievance in a perfunctory manner by not gathering sufficient evidence to prove the case. ***Vaca v. Sipes***, at 194.

Because a fair and honest hearing is required by contract and by law, it is not unreasonable for this court to provide clarification and some expansion of the test for breach of duty of fair representation. Additional oversight is needed because the system is not working as anticipated by this Court. For over 26 years this Court has believed that the ***Hines*** test provided adequate supervision for the grievance machinery. This court believed that the requirement for a fair and honest hearing was being met. Based upon the Sixth Circuit's incarnation of the ***Hines*** test, this Court is justified in providing some additional guidance at this time.

Moreover, the implementation of the test recommended by Petitioner will assure that the legislative effect of the contract will be brought to bear. The administration of the contract should not be by litigation; it should be by legislation. LMRA contemplates that the legislative aspect of the arbitration process can work where employers, unions and employees know the law and the basic guidelines for its implementation. But under present practice, the union is not even providing information about the rules which interpret the contract. This case illustrates how the lack of knowledge leads to increased litigation and virtually guarantees that the employee will not be made whole. The Sixth Circuit's focus on mere negligence has clouded over the real issue. The truth is, Neal did not do anything to affirmatively meet his duty to represent Garrison. Neal totally failed to advocate, and he served essentially as a false witness against Garrison. Neal did not divulge information in his possession when he had a duty to do so. Garrison did not have a fair and honest hearing.

Had Neal been required to provide information about Cassens' position and about prior National Seniority Committee decisions, Garrison could have been prepared. Neal and the union totally failed to provide information to Garrison with respect to the charges against him and with

respect to information necessary to prepare for his hearing. Neal did not assure that Cassens follow contractual procedures for proper notice. Neal totally failed as an advocate: he had no ideas, no strategy, and no interest in even affirming Garrison's contractual rights. The Sixth Circuit finds that this is "merely negligence" and therefore not a breach of the duty to represent Plaintiff. If this Court determines that the Sixth Circuit's statement of existing law is correct, a new standard is needed to protect the arbitral process from corruption, and to change it from its present form: **an arbitrary process**. The new test suggested by Garrison should result in fair and honest hearings at the lowest level, where a fair decision can be reached; at the very least an honest decision will be reached. Employees can be made whole as required under the contract. The finality provisions of the collective-bargaining agreement could then be fairly implemented.

II. Respondent is Not Entitled to a Judgment as a Matter of Law Because the Sixth Circuit Applied the Wrong Legal Standard to Review a Rule 50 Motion by Failing to Even List or Consider Relevant Facts that Garrison Presented at Trial and Advanced in His Brief Showing That the Union was Guilty of Bad Faith, and by Failing to Draw Reasonable Inferences in Favor of the Non-Moving Party.

The District Court instructed the jury that in order to find for Garrison it must find that the union breached its duty of fair representation because its conduct in the grievance was arbitrary, discriminatory or in bad faith. The jury was given definitions and examples of arbitrary, discriminatory and bad faith conduct. App. 102a - 104a. After the jury returned its special verdict form App. 116a - 118a, Defendant renewed its Rule 50 motion for judgment as a matter of law. The District Court reconsidered Defendant's motion and concluded that the

jury could have found that there was **bad faith** on the part of the union and that the jury could have found that the union's conduct was arbitrary and irrational. Specifically the court examined Neal's behavior in the grievance process and Local 327's total failure to advocate for Garrison. Of critical importance was the evidence that Neal, who had much more credibility than Garrison, said absolutely nothing before the National Seniority Committee to support Garrison or that Garrison's seniority was protected by the plain language of the contract. The jury could certainly have found that Neal's conduct was motivated by his bad faith desire to avoid blame himself. The court concluded that it would not be conjecture for the jury to conclude that the union was guilty of bad faith. App. 83a.

The Court of Appeals for the Sixth Circuit reversed the District Court holding that petitioner had not introduced sufficient evidence under the arbitrary prong but said nothing about "bad faith". The Sixth Circuit panel parroted the test: "...a union owes employees a duty to represent them adequately as well as honestly and in good faith." App. 19a. However, the court only analyzed the arbitrary prong of the union's duty of representation. Nowhere in the decision is there any discussion whatsoever of the union's bad faith or discriminatory conduct.

BAD FAITH BY LOCAL 327

Petitioner made a substantial showing that Local 327 acted in bad faith. That evidence is summarized chronologically in the Appendix, which lists 17 examples of bad faith by the union. App. 105a - 115a.

Bad faith in Garrison's case, as it does in most cases, revolves around an understanding of the motivation of the bad actor. The union in Garrison's case failed to assure that his name was on the seniority list while he was recuperating from

his work-related injury in November, 1994. Neal testified to the National Committee in January, 1995, that the list was complete. It was not. It did not contain Garrison's name. There is no question that the union had a duty to assure that Garrison's name was on that list. The problem is compounded when Local 327 goes to the National Arbitration Committee in January, 1995 and swears up and down that the list is complete. The union was to blame for Garrison's name not being on the list.

In June of 1996, Garrison returned to work and found that his name was not on the seniority list. Cassens denied him employment and lied by stating Cassens was never informed of Garrison's election to follow the work. Two months after the initial grievance hearing at the local level, Cassens changed its position and stated that Garrison was denied employment because of the alleged "30-day rule." The union was informed of Cassens' new position in August of 1996, but Neal never told Garrison that Cassens was advancing this alleged "30-day rule." Neal was probably not too excited about appearing at the upcoming National Committee hearing at Dana Point in front of the same people that he falsely told in January, 1995 that the list was complete. The union failed to assure Garrison's name was on the list. This failure made Neal's union at least partly liable for Garrison's lost wages from June, 1996. Cassens' alleged 30-day rule offered Neal a way out of this embarrassment and liability for Local 327. Neal had a motive to see that the secret 30-day rule defeated Garrison's grievance.

Neal assured Garrison that he was ready for his grievance and that Garrison didn't need to add anything to his presentation to the National Seniority Committee. Neal said it was a "slam dunk." Neal led Garrison to believe he had a "slam dunk" all the way through the grievance process. Neal's statements and subsequent silence were affirmative

misrepresentations of fact. It was not mere negligence. Neal knew that Cassens was advancing its fake 30-day rule. Neal knew that other employees were not held to a 30-day rule. Neal knew that the contract protected seniority rights and Garrison's circumstances, but he kept all of this to himself. Neal not only affirmatively misrepresented to Garrison that he didn't need to do anything further to prepare for his grievance, but Neal also failed to disclose what Local 327 knew about relevant facts essential to Garrison's case. Neal was also guilty of misrepresentation by silence. The local union is at least responsible for what it knows. Under the test advanced by the Sixth Circuit, the union is not held responsible for misrepresentation, which is fraud, nor is the union responsible for refusing to disclose information necessary to the grievant in the hearing process.

Why did Neal refuse to give information, assistance or strategy to Garrison? Neal was a professional union representative who was supposed to act in Garrison's behalf. He offered no help. Garrison was left on his own completely to investigate, apply the contract, and argue his case. This was true both in the preparation of the grievance and in the testimony before the National Seniority Committee at Dana Point in 1996. Neal was virtually mute at that hearing. He said nothing to assist Garrison or to argue against Cassens' fake 30-day rule which he knew was not in the contract or prior Committee decisions. Neal knew this 30-day rule was a fake and he knew the 30-day rule was not applicable to Article 5, Section 4(c) of NMATA. Neal knew the fake 30-day rule was never applied to other members of Local 327. It looks like Neal wanted Garrison to lose.

There is direct evidence of bad faith on the part of the union based on the transcript from the Dana Point hearing. At that hearing Joe Clark, on behalf of Cassens, repeatedly blamed Local 327 for failing to assure that Garrison's name

was placed on the list. Clark pounded away at Local 327 at the Dana Point hearing because of Local 327's failure to check the list prior to Neal reporting to this same Committee in 1995 that the list was complete. App. 119a - 121a. The union was guilty. After these accusations were leveled at Neal and the local union, Neal became incoherent. Neal allowed the fake 30-day rule to be advanced by Cassens because it exonerated him and his union of liability and guilt. The union knew that the contract protected Garrison's seniority rights. The Avon Lake Decision of 1992 was the only prior precedent on point. Neal had an audience that could easily have been reminded of Avon Lake. App. 122a. Between August and November, 1996, Neal had four months to research and find the Avon Lake Decision. Neal had four months to double check the seniority lists which show that other Local 327 employees were not subject to Cassens alleged 30-day rule. But during this four month period, Neal did nothing. His motives under these circumstances were at issue. His motives were judged by the jury, but ignored by the Sixth Circuit. Why did Neal totally fail to advocate for Garrison when it was obvious that the company was advancing an outrageous position contrary to the contract and violative present practice? There are two possibilities: One, he didn't know the contract or present practice in the industry or, two, he wanted Garrison to lose. It is not possible that Neal failed to realize the seniority rules he helped negotiate. The jury realized Neal acted in bad faith.

The Sixth Circuit Panel in Garrison's case totally failed to consider: (1) the evidence of bad faith presented at trial, (2) the District Court's ruling on the Rule 50 motion, (3) the post-trial motions for new trial, and (4) arguments with respect to the local union's bad faith in Plaintiff's brief. In so doing, the Sixth Circuit failed to follow the law which requires it to review the evidence. Where the Court of

Appeals refuses to consider evidence favorable to the plaintiff in a Rule 50 Motion, that court commits reversible error. ***Reeves v. Sanderson Plumbing Products, Inc.***, 530 U.S. 133 (2000). The Sixth Circuit Court of Appeals must be reversed because it failed to consider the evidence. Garrison argued from the beginning of trial through briefs filed in the Sixth Circuit, that Neal's conduct was motivated by bad faith. There is evidence that Neal handled the grievance in a dishonest fashion, and that he was guilty of misrepresentation and fraud. It is error for the Sixth Circuit to ignore this evidence and substitute its judgment for the jury. The Court of Appeals limited its review exclusively to facts relating to the arbitrary prong of the test. In so doing, the court apparently looked only at the Respondent's explanation for the union's behavior. The court essentially confined its review to evidence and inferences favorable to the union and to Cassens.

ARBITRARY CONDUCT BY LOCAL 327

The question remains, irrespective of the Court of Appeals' error in ignoring evidence of bad faith, was Respondent entitled to a judgment as a matter of law on the arbitrary prong of the duty of fair representation. Under Rule 50 the court should render judgment as a matter of law where there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. ***Id.*** at 2109. In making its determination, the court should draw all reasonable inference in favor of the non-moving party and it may not make credibility determinations or weigh the evidence. ***Id***, at 2110; citing ***Litle v. Household Mfg., Inc.***, 494 U.S. 545 (1990).

The Court of Appeals failed to draw reasonable inferences in favor of Petitioner. For instance, Neal's own testimony from the transcript of the National Seniority Committee

hearing indicated Local 327's guilt for Garrison's name not being on the seniority roster. The jury could reasonably infer that Neal knew at the time of Garrison's hearing that prior precedent stated that Garrison's seniority rights were protected. The jury could also infer that Neal knew other Local 327 members were dovetailed with Cassens list even though they were on injury status and could not show up for work in 30 days. Neal provided no satisfactory explanation for his behavior. Neal gave up the seniority of Garrison and all other drivers, and gained nothing in return, save the exoneration of Local 327 for failing to get Garrison's name on the list. It is not implausible, illogical, internally inconsistent, nor does it contradict any documentary or other extrinsic evidence to find that the union acquiesced to Cassens' intentional misconduct. In concluding that this evidence overwhelmingly proves that the union was only negligent the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the judgment of the jury.

III. The Sixth Circuit Decision in Garrison's Case Must Be Reversed Because it Applied the Wrong Legal Standard for Breach of the Duty of Fair Representation in the Grievance Process by relying on *Airline Pilots Ass'n Int'l v. O'Neil*, Which Involved the Decision to Settle a Strike, When it Should have Relied on *Hines v. Anchor Motor Freight, Inc.*, Which Established the Standard for Breach of the Local Union's Duty to Represent the Employee in the Grievance Process.

The decision by the Sixth Circuit should be reversed because the "totally irrational" test from ***Airline Pilots Ass'n Int'l vs. O'Neill***, 499 U.S. 65 (1991), does not provide the correct standard for breach of the duty of representation in the context of the grievance process. ***Airline Pilots*** reviewed the

union's duty of fair representation to a class of employees where the International Union negotiated a back-to-work agreement terminating a strike. The rationality of the union's decision to settle a strike is evaluated in light of the facts and legal climate that confronted the parties at the time. ***Id.*** at 78. In ***Airline Pilots***, this court looked at the settlement reached by the union negotiators on behalf of the class, and determined that it was by no means irrational.

In Garrison's case, the Sixth Circuit was not reviewing a back-to-work agreement or the termination of a strike. The Sixth Circuit was not reviewing the conduct of the International Union toward a class of members. In Garrison, the issue was whether the local union breached its duty to one person, Garrison, in the grievance process. The local union should be reviewed under the standard in ***Hines*** where the issue was proper representation in a grievance, and not ***Airline Pilots***, where this Court reviewed the rationality of a good faith non-discriminatory union decision to end a strike. ***Airline Pilots Ass'n Int'l v. O'Neil***, at 78. Understandably, in that context, as in litigation, even a bad settlement may be more advantageous in the long run than a good lawsuit. In our case, Local 327 "resolved" Garrison's grievance by sabotaging his case which resulted in a lawsuit.

The language of ***Airline Pilots*** suggests that there is more judicial review of the substance of representation by the union in a grievance hearing than in the context of a settlement of a strike. In ***Airline Pilots*** the court specifically stated: "Any substantive examination of the union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." ***Id.*** at 78 The decision to settle a strike is accorded the "wide range of reasonableness". ***Id.*** at 78 citing ***Ford Motor Company v. Huffman***, 345 U.S., 330, 338.

In our case, the decision not to provide Garrison with a fair hearing was not a labor dispute that was resolved in favor of avoiding a strike and a lawsuit. There was no competing interest for Local 327 between Garrison and any other employee. The question simply for Local 327 was whether or not it was going to help Garrison.

What is the range of reasonableness that should be afforded to a union representative who does not provide an employee with essential information in the grievance process? The answer is in ***Hines***. where this Court affirmed the reversal of the trial court because there was evidence that the local union failed to investigate and assured the employees they had nothing to worry about. ***Hines*** at 560. In Garrison, there was evidence that the union was guilty of the same misconduct as in ***Hines***. But the Sixth Circuit claims that as a matter of law there cannot be a breach of the duty to represent an individual employee unless the result of the grievance process is "wholly irrational." If that is correct, then ***Hines*** is effectively overruled. It is simply not true that ***Airline Pilots*** stands for the proposition that the union's representation of an individual employee in a grievance is to be judged by whether the outcome is "wholly irrational."

In the process of Garrison's grievance hearing the union's conduct was as follows:

1. The local union assured Garrison that he was ready for the Dana Point hearing. Neal did no research. Neal had no strategy. The local union did not even point out the obvious fact that the clear and unambiguous terms of the contract protect Garrison's seniority.

2. Local 327 did not tell Garrison about the defense advanced by Cassens. Instead, Neal left him in the dark while telling Garrison his case was a "slam dunk." Neal did not tell Garrison about other members of Local 327 who kept their

seniority with Cassens irrespective of this fake 30-day rule. Local 327 provided no advocacy for Garrison.

3. Local Union 327 acted in the opposite fashion of the union in ***Airline Pilots*** where the union acted in good faith to obtain a settlement that later may not have been more advantageous in the long run for one class of employees than a lawsuit. There was no similar "trade off" in Garrison. In Garrison's case, the union did nothing to protect Garrison's seniority rights or the rights of other employees whose seniority would later follow Garrison to the gallows of the false 30-day rule.

The Sixth Circuit Panel holds that this conduct was not wholly irrational and, therefore, was the result of mere negligence on the part of Neal. So, the argument goes, employees must live with an unjust result caused by the union's malfeasance without any remedy for damages. According to the Sixth Circuit in Garrison's case, as a matter of law it is merely negligent for a union representative to decide not to tell an employee the reason the company was advancing to defeat his grievance.

Neal's choice was: "Should I say something for Garrison or let him lose at the Dana Point hearing in November of 1996?" Neal decided to say nothing. Neal's silence spoke volumes to the National Seniority Committee. There is no way to construe that conduct as rational. In light of the contract, which Neal knew well because he had negotiated it, and the fact that other Local 327 members had not lost their seniority because of Cassens' contrived thirty (30) day rule, Neal's silence before the National Seniority Committee amounts to a conscious decision that Garrison would lose his grievance. That decision is unlike the conscious decision to end a strike. It is not useful or practical to evaluate the

outcome in Garrison's case under the "wholly irrational" standard established in ***Airline Pilots Ass'n Int'l v. O'Neil***.

CONCLUSION

This Court should reverse the Sixth Circuit Court of Appeals' decision because it misapplied the legal standard for a union's breach of its duty to represent an employee as described in ***Hines v. Anchor Motor Freight, Inc.*** This Court could also reverse the Sixth Circuit because it failed to apply the correct legal standard for a review of a Rule 50 motion. Lastly, Petitioner respectfully requests that this Court reconsider the parameters of the union's duty to represent an employee in a grievance. Is it implicit in the union's duty to represent the employee that he receive a fair and honest hearing?

Garrison, and all other employees under this contract, need this Court's relief. Garrison is entitled to review by this Court because the standard announced by the Sixth Circuit results in a process that lacks even a minimum level of integrity. As this Court so eloquently described in ***Hines:***

> Congress has put its blessing on private dispute settlement arrangements provided in collective-bargaining agreements, but it was anticipated, we are sure, that the contractual machine would operate with some minimum levels of integrity." ***Hines,*** at 571.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 01-6056/02-5124

[Filed September 5, 2003]

DAVID L. GARRISON, Plaintiff-Appellee,

v.

CASSENS TRANSPORT COMPANY, Defendant-Appellant.

BEFORE: BOGGS and SILER, Circuit Judges; and STEEH,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. George C. Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-6056; 02-5124

[Filed July 7, 2003]

David L. Garrison,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
Cassens Transport Company,	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 98-00415
Aleta A. Trauger, District Judge

Before: BOGGS and SILER, Circuit Judges; STEEH, District Judge.

JUDGMENT

THIS CAUSE was heard on the record from the district court was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that in Case No. 01-6056 the jury verdict is REVERSED and the case is REMANDED for entry of judgment as a matter of law for defendant Cassens Transport Company. IT IS FURTHER ORDERED that in Case No. 02-5124 the district court's contempt order is REVERSED and VACATED in its entirety.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-6056; 02-5124

[Filed July 7, 2003]

David L. Garrison,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
Cassens Transport Company,	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 98-00415
Aleta A. Trauger, District Judge

Before: BOGGS and SILER, Circuit Judges; STEEH, District Judge.*

OPINION

SILER, Circuit Judge. In No. 01-6056, defendant Cassens Transport Company ("Cassens") appeals the judgment after a jury verdict in favor of plaintiff David L. Garrison in this hybrid § 301 (29 U.S.C. § 185) breach of contract/fair

* The Honorable George Caram Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

representation suit. In No. 02-5124, Cassens appeals the order by the district court holding it in civil contempt for failure to: immediately reinstate Garrison to employment; make certain pension payments; and assign a "company seniority" date that corresponds with the date that Garrison could have commenced working for Cassens upon his return from his worker's compensation injury. Numerous issues have been raised on appeal. After carefully reviewing the record, and viewing the evidence in the light most favorable to Garrison, we find that the evidence at trial was insufficient to establish a breach of the duty of fair representation by the union. Accordingly, the district court erred in not entering judgment in favor of Cassens pursuant to Rule 50 of the Federal Rules of Civil Procedure. Also, because there was no basis for the imposition of liability, we necessarily find that the civil contempt order can no longer stand. Therefore, we **REVERSE** the jury verdict and **REMAND** to the district court for the entry of judgment as a matter of law for Cassens. Also, the civil contempt order of January 7, 2002, is **REVERSED** and **VACATED** in its entirety.

I. BACKGROUND

Garrison began his employment as a driver with Allied Systems, Ltd. ("Allied") and/or its predecessor, Auto Convey, Inc., in 1980. Allied is a trucking company engaged in the auto transport business. In 1986, Garrison transferred to Allied's Smyrna, Tennessee, terminal, where he was employed as a driver until November 21, 1990, when he sustained an on-the-job injury. Cassens is also a trucking company engaged in the delivery of automobiles to vehicle dealerships in the United States. Since 1983, Cassens has maintained an operation in Smyrna, Tennessee.

Drivers for Allied and Cassens are members of Teamsters Local 327, which is affiliated with the Internal Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL-CIO. Local 327 is the exclusive bargaining representative of Allied and Cassens drivers for collective bargaining purposes. Allied, Cassens, and Local 327 are signatories to a multi-employer, multi-union collective bargaining agreement referred to as the National Master Automobile Transporters Agreement ("NMATA") and the Central-Southern Areas Supplemental Agreement. NMATA governs the terms and conditions of driver employment with these companies. While employed by Allied as a driver at the Smyrna terminal, Garrison was a member of Local 327 and was covered by NMATA.

At all times relevant to this case, Nissan Motors had an assembly plant located near Allied's and Cassens's Smyrna operations. In September 1994, as a result of a competitive bid process, Nissan awarded Cassens and another trucking company, Commercial Carriers, Inc., its Smyrna transport work, which previously had been performed by Allied. Shortly thereafter, Allied notified all Allied employees working out of the Smyrna terminal, including Garrison, of Nissan's decision to transfer its work to Cassens and Commercial Carriers. A memorandum was sent enclosing a form on which drivers could designate whether they wished to follow the work to Cassens or Commercial Carriers or stay with Allied and seek work at another terminal.

As a result of Nissan's decision to transfer its work, Allied, Cassens, Commercial Carriers, and Local 327 submitted a request to the National Joint Arbitration Committee (the "NJAC") for a determination of the seniority rights of Allied employees affected by the work transfer. The NJAC issued its decision, ruling that pursuant to NMATA,

Allied drivers had the right to transfer either to Cassens or Commercial Carriers to follow the Nissan work. Regarding seniority rights, the NJAC stated that Allied's seniority list was "to be dovetailed[1] by terminal seniority[2] with the Cassens and Commercial [Carriers] Smyrna Seniority Lists."

As required by the NJAC's decision, Allied was responsible for preparing separate lists of Allied drivers seeking to transfer to Cassens and Commercial Carriers. After the NJAC decision, Garrison, who was still off work, received two letters from Allied. The first advised Garrison of his work options and stated that if he did not choose to follow the work to Cassens or Commercial Carriers he would be laid off from Allied, effective several days later. The second letter was a premature layoff notice.

The next day after receiving these letters, Garrison telephoned Allied's terminal manager and advised him that he wanted to follow the work to Cassens. In two follow-up letters dated November 9, 1994, Garrison confirmed his

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[1] Under NMATA, Art. 5, § 1 "'Dovetail seniority' is a term that is applied when two (2) or more seniority lists are merged or combined with a single seniority list which recognizes the terminal seniority date of each employee. The list is arranged by terminal seniority date with the most senior employee at the top."

[2] NMATA recognizes two different types of seniority: company seniority and terminal seniority. "'Company seniority' is a term that is applied to an employee's date of hire by the Employer." Art. 5, § 1 "'Terminal Seniority' is a term that is applied to the employee's most recent date of employment at a specific terminal." *Id.* "'Terminal' is a term that is applied to any facility of an Employer to which employees are assigned to work whether called a branch, terminal division or operation." *Id.*

receipt of Allied's letters and restated his intentions to follow the work to Cassens. Garrison copied the letters to the business agent for Local 327.[3] Garrison's letters were both signed "Received" by James Firkus, Cassens's Smyrna terminal manger. Several days later, Garrison received notice from Allied that based upon his decision to transfer to Cassens, his name was being removed from Allied's seniority list. He was never informed that he would be required to report to work within thirty days of his notification election.

On June 7, 1996, approximately nineteen months after Garrison submitted his transfer election forms, he obtained a medical release from his doctor permitting him to return to work. That same day, he contacted Cassens inquiring into when he could begin work. The assistant terminal manager at Cassens's Smyrna terminal informed Garrison that his name did not appear on Cassens's Smyrna seniority roster and that he would need to speak with Firkus, who was on vacation. Several days later, Garrison spoke with Firkus, who stated that Garrison was not on Cassens's applicable seniority list and that it would be necessary to contact Cassens's Labor Relations Director, Joe Clark, to discuss the situation.

Garrison then went to the Local 327 office in Nashville, Tennessee, and met with Jimmy Neal, Local 327's business

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[3] Garrison also wrote a separate letter to Local 327's now former business agent, George Barlow, informing him that he wanted to follow the work to Cassens and that he had notified Allied of this preference. In that letter, Garrison specifically asked Barlow to follow up his request to work for Cassens and to make sure that his name was placed on the seniority list at Cassens.

agent,[4] and David Hodgin, the president of Local 327, to discuss his predicament. After discussing the situation, Neal expressed his view that Garrison's case was a "slam dunk." He provided Garrison with a form so that he could prepare a grievance to be submitted to Cassens. Neal also arranged an informal meeting to be held the following day to discuss Garrison's request to return to work.

The next day, an informal meeting was held at Cassens's Smyrna terminal between Garrison, Neal, Firkus, and Mark Flett, a union steward for Cassens's employees. Firkus would not agree to put Garrison to work. According to Garrison, Firkus indicated that the problem was that Garrison had never been placed on the seniority list back in 1994. The next day, Garrison discovered that Firkus had signed for the employment notification letters he sent in November 1994. That afternoon, he confronted Firkus about his signatures. Initially, Firkus indicated that he believed the signatures were forgeries. Subsequently, he admitted it was his signature on each of the letters.

Less than a week later, Garrison submitted a grievance to Local 327, outlining his position that he had properly notified Cassens of his preference to follow the Nissan work. A local hearing was then held concerning Garrison's grievance at Cassens's Smyrna terminal. At the hearing, Neal, who was Garrison's union representative, asserted that Garrison should be permitted to work for Cassens and should be placed on Cassens's seniority list with a 1994 seniority date. Cassens took the position that it was unaware that Garrison had elected to transfer to Cassens, that his name had not appeared on any

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[4] In January 1995, Neal replaced Barlow as Local 327's business agent.

of the seniority lists or the transfer lists that had been provided by Allied, and that Cassens did not have a contractual obligation to employ him.[5]

The parties' inability to reach an acceptable resolution to Garrison's grievance resulted in the matter's being submitted for arbitration. Neal docketed the grievance with the Southern Area Automobile Transporters Grievance Committee to be addressed at its August 1996 meeting in New Orleans, Louisiana. At Neal's recommendation, Garrison did not attend this proceeding, although Neal was present on his behalf.[6] During the proceeding, Cassens, through its representative, Joe Clark, reasserted its position that it did not have a contractual obligation to Garrison. In addition, for the first time, Cassens invoked a "30-day rule" and argued that Garrison's seniority transfer opportunity had expired because he had not reported to work at Cassens within thirty days of the transfer opportunity. At the conclusion of the proceeding, Garrison's case was referred to the National Joint Standing Seniority Committee (the "NJSSC") in Dana Point, California. It appears that at no point after the Southern Area proceeding did Neal inform Garrison that Cassens had raised the defense of the thirty-day rule. It is this somewhat obscure rule that serves as the driving force behind this litigation.

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[5] At trial, Garrison's theory for Cassens's refusal to hire him was that Cassens did not want someone on the payroll who had suffered serious back injuries because of the risk of future worker's compensation claims.

[6] Neal told Garrison that nothing substantive would happen at the Southern Area proceeding and that his grievance would be scheduled to be heard by the National Joint Standing Seniority Committee in California.

Garrison's grievance was ultimately scheduled to be heard on November 5, 1996. In preparing for this proceeding, Garrison and Neal kept in constant contact. They had several meetings and spoke on the phone almost every day. During this preparation stage, Garrison focused exclusively on trying to prove that he properly notified Cassens of his intentions to follow the Nissan work. Ultimately, Garrison forwarded to Neal a ten-page, ninety-seven paragraph typed presentation with twenty-eight exhibits for the upcoming arbitration. Neal reviewed the presentation and thought that it was one of the best he had ever seen.

Approximately forty-eight hours before the proceeding, Neal, Garrison, and Clark met to exchange documents and information. Garrison gave Clark a copy of his presentation and Clark gave Neal and Garrison seven prior joint arbitration committee decisions that he intended to use in support of Cassens's thirty-day defense. This appears to be the first time that Garrison was made aware of the existence of a thirty-day rule. Garrison and Neal reviewed these decisions and decided that they were not applicable or were distinguishable from the circumstances involved in the instant matter. Neal failed, however, to realize or explain the potential significance the thirty-day rule could have on Garrison's grievance. Consequently, no rebuttal--either by Neal or Garrison--was prepared on the issue of the thirty-day rule.

In presenting Garrison's grievance to the NJSSC, Neal introduced Garrison to the committee and read Garrison's grievance into the record. Garrison read a prepared statement and introduced exhibits in support of his case. Neither Neal nor Garrison made any mention or otherwise tried to obviate any argument regarding the thirty-day rule. On Cassens's behalf, Clark argued that (1) Cassens had not been notified of Garrison's intent to transfer from Allied to Cassens; (2)

Garrison had never appeared on a Cassens seniority list; (3) Cassens did not have any contractual obligation to Garrison; and (4) Garrison did not comply with the thirty-day rule when he appeared for work in 1996. Clark handed committee members copies of arbitral precedent that he believed supported Cassens's position that "a man has thirty days from the date of the transfer [in] which he must make himself available." Although he did not refer to any of these cases by name, he asserted that Cassens did not believe that it had any obligations to Garrison "under the procedures and decisions previously rendered by the Committee." Other than these brief statements and the submission of the prior committee decisions, Clark did not initially make any other arguments regarding the applicability of the thirty-day rule to Garrison's case.

Although Local 327 was free to rebut any aspect of Cassens's case, it appears that Neal completely failed to address the applicability of the thirty-day rule.[7] Garrison himself, however, put forth some rebuttal to Cassens's thirty-day rule argument, stating that "I did not believe the thirty (30)-day report rule . . . is applicable, because you will find [that] in NMATA . . . seniority shall not be broken except by discharge, voluntary quit, [or more than a seven (7)-year layoff]." After Garrison's rebuttal, one of the members of the committee asked Neal whether he had anything further to add and Neal responded, "No, sir. I don't. I think you got the

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[7] Cassens argues that Neal responded to the thirty-day reporting rule but alleges that the tape did not pick up all of the Neal's comments as reflected by the gap (--) noted in the transcription. We concur with the district court's view that this argument is unpersuasive guesswork on Cassens's part. It is just as likely that the gap noted in the transcription signifies a pause in Neal's rebuttal as Neal was attempting to gather his thoughts.

case." In his final response, Clark more forcefully fleshed out Cassens's position on the applicability of the thirty-day rule:

> Mr. Garrison . . . could not report in thirty (30) days or any relevant time period. You're looking at almost two (2) years before he could report to us -- that has not been the decisions that have been rendered by this Committee and other committees. Specifically, if you go to the decisions that I handed out to you . . . [one decision] involves the very same local, Local 327. The discussion specifically talks about being able to report in thirty (30) days of the transfer. It's just one of the seven (7) that I gave you. Again, it specifically relates to the grievant in that particular case being on an on-the-job injury and could not report. The very same thing that we have here, gentleman. Mr. Garrison cites to you the language in the contract about seniority. We're not trying to break his seniority. All we're saying is Mr. Garrison does not belong on our seniority list, again, for all the reasons we cited to you.

Following this hearing, the NJSSC issued its decision denying Garrison's request for employment with Cassens. The committee held for Garrison on the notice issue. Specifically, it found that Garrison made a timely request to Cassens for employment and that this request was acknowledged by Cassens's terminal manager. The NJSSC found, however, that "[p]rior decisions of this Committee require that employees who follow their work . . . make themselves available for work within thirty days after expressing their desire to do so." Because Garrison was not available to work for Cassens during the applicable thirty-day period, the NJSSC found that his transfer rights were extinguished. Thus, the thirty-day rule ultimately proved dispositive of Garrison's grievance.

Although the committee relied on the seven arbitral precedents submitted by Cassens in reaching its conclusion, none of the decisions specifically involved the dovetailing of seniority rights; instead, all of the cases involved attempted in-company transfers to either new terminals, new jobs, or other terminals with new work opportunities.

The one apparent NJSSC decision that presented a strikingly similar issue as that involved in Garrison's case was not brought to the committee's attention. In May 1992, Cassens previously asked the NJSSC for guidance "as to how long [Cassens] is obligated to afford work at the Avon Lake facility to an E&L Lorain driver presently on a leave of absence due to an on-the-job injury." Cassens Transp. Co. v. Local Union No. 571 and E&L Transp. Co. Local Union 964, No. 5-92-(2-92)-465-A. The NJSSC determined that "[w]ith regard to the E&L employee on workers' compensation who has elected to transfer to Cassens, he is to be deemed as transferred and will hold seniority at Avon Lake and will be permitted to assume an active position upon his release from compensation status." *Id.* In light of this holding, it may have been difficult for the committee to distinguish Garrison's situation from its earlier precedent.

Thereafter, Garrison initiated a federal action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, against Cassens, Local 327, and others. All defendants except Cassens and Local 327 were dismissed from the lawsuit. Following a settlement agreement, Local 327 was voluntarily dismissed from the suit. Thereafter, the hybrid action continued solely against Cassens. The case then proceeded to trial. At the conclusion of Garrison's case in chief and again at the close of trial, Cassens moved for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. The court denied the motion and submitted the

case to the jury. The jury found in favor of Garrison and awarded $408,885 in compensatory damages, allocating seventy-five percent of liability to Cassens and twenty-five percent to Local 327. It also awarded $500,000 in punitive damages against Cassens. Thereafter, Cassens renewed its Rule 50 motion, which was again denied by the court. Cassens then moved for a new trial under Rule 59 of the Federal Rules of Civil Procedure, which was also denied.

In case No. 01-6056, Cassens argues that the district court erred in: (1) denying its pretrial motion for summary judgment; (2) denying its motion for judgment as a matter of law pursuant to Federal Rule 50; (3) refusing to instruct the jury on its defense that a particular section of NMATA must be considered in determining whether Cassens breached the collective bargaining agreement; (4) affirming the compensatory award when the record established that Garrison failed to mitigate damages; (5) affirming the jury's allocation of liability; and (6) upholding an award of $500,000 in punitive damages.

The district court erred in denying Cassens's motion for judgment as a matter of law under Federal Rule of Civil Procedure 50. Consequently, we need not decide the many other assignments of error raised by Cassens on appeal, which have all been rendered moot. Also, because a remedial contempt order cannot survive the reversal of the underlying order giving raise to the contempt judgment, we reverse and vacate the district court's order in case No. 02-5124.

II. ANALYSIS

A. *Denial of Summary Judgment*

Cassens argues at length that the district court erred in denying its motion for summary judgment and reconsideration pursuant to Rule 56 of the Federal Rules of Civil Procedure. However, "where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed." *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *see also K&T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 174 (6th Cir. 1996) (holding that "in cases where an appellant made a Rule 56 motion for summary judgment that was denied, makes those same arguments in a Rule 50(a) motion at the close of evidence that was also denied, lost in front of a jury, then renewed its arguments in a rejected Rule 50(b) motion after the entry of judgment, we will review only the denial of the Rule 50(b) motion"). Accordingly, because there has been a trial on the merits, we will not review the district court's denial of summary judgment.

B. *Motion for Judgment as a Matter of Law*

Cassens moved for judgment as a matter of law pursuant to Rule 50 at the conclusion of Garrison's case in chief, at the end of trial and again after the jury's verdict. On appeal, it argues that the evidence at trial was insufficient to support the jury's finding that (1) Local 327 breached its duty of fair representation, (2) any alleged breach by the union more than likely adversely impacted the grievance process, and (3) Cassens breached the collective bargaining agreement. "An appeals court reviews a denial of a Rule 50(b) motion *de novo*, applying the same test as the district court must apply." *Gray v. Toshiba Am. Consumer Prods.*, 263 F.3d 595, 598

(6th Cir. 2001). "We do not weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the jury." *Wehr v. Ryan's Family Steakhouses, Inc.*, 49 F.3d 1150, 1152 (6th Cir. 1995). "Instead, we must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences." *Phelps v. Yale Sec. Inc.*, 986 F.2d 1020, 1023 (6th Cir.), *cert. denied*, 510 U.S. 861 (1993). "The motion should be granted, and the district court reversed, only if reasonable minds could not come to a conclusion other than one favoring the movant." *K&T Enters. Inc.*, 97 F.3d at 176.

In the instant case, following the jury's verdict, the district court stated that it was both "dumbfounded" and "surprised" by the result. While ruling from the bench, the court suggested that it disagreed with the verdict; however, it explained that "the law really doesn't favor setting aside a jury verdict . . . certainly not because the judge disagrees with the verdict." Our careful review of the extensive appellate record convinces us that the evidence presented to the jury was insufficient to support a finding of liability on the issue of Local 327's breach of its duty of fair representation.

1. *Elements of a Hybrid § 301 Action*

"A hybrid *section 301* action involves two constituent claims: breach of a collective bargaining agreement by the employer and breach of the duty of fair representation by the union." *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 583 (6th Cir. 1994) (citation omitted). The two claims are "inextricably interdependent." *DelCostello v. Teamsters*, 462 U.S. 151, 164, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983) (internal quotation marks and citation omitted). Unless a plaintiff "demonstrates both violations, he cannot succeed

against either party."[8] *Bagsby v. Lewis Bros. Inc. of Tenn.*, 820 F.2d 799, 801 (6th Cir. 1987) (emphasis omitted). In order to prove a breach of the duty of fair representation, an employee must demonstrate that the union's actions or omissions during the grievance process were arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967). Each of these wrongs is mutually independent, meaning, that "the three named factors are three separate and distinct possible routes by which a union may be found to have breached its duty." *Black*, 15 F.3d at 584. "Actions for a union's breach of its duty of fair representation depend for their rationale on the union's otherwise-complete control over the handling of an employee's grievance." *Id.* "Just as . . . fiduciaries owe their beneficiaries a duty of care as well as duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith." *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 75, 113 L. Ed. 2d 51, 111 S. Ct. 1127 (1991) (citations omitted). There is no requirement, however, that the grievance process be "error-free." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571, 47 L. Ed. 2d 231, 96 S. Ct. 1048 (1976).

With regard to the arbitrary prong, "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *O'Neill*, 499 U.S. at 67 (citation omitted). Mere negligence

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[8] It is of no consequence that Garrison has already settled with Local 327. In a hybrid § 301 suit, an "employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." *DelCostello*, 462 U.S. at 165.

on the part of a union does not satisfy this requirement. *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 372-73, 376, 109 L. Ed. 2d 362, 110 S. Ct. 1904 (1990). Moreover, ordinary mistakes, errors, or flaws in judgment also will not suffice. *See Walk v. P*I*E* Nationwide, Inc.*, 958 F.2d 1323, 1326 (6th Cir. 1992) (citations omitted). That is, "an unwise or even an unconsidered decision by the union is not necessarily an irrational decision." *Id.* In essence then, to prevail, a plaintiff has the difficult task of showing that the union's actions were "wholly irrational." *O'Neill*, 499 U.S. at 78. The "wholly irrational" standard is described in terms of "extreme arbitrariness." *Black*, 15 F.3d at 585 ("[T]he relevant issue in assessing a Union's judgment is not whether it acted incorrectly, but whether it acted in bad faith, or extremely arbitrarily, or discriminatorily.")(internal quotation marks and citation omitted).

When reviewing a union representative's actions or omissions, we must never lose sight of the fact that union agents are not lawyers, and as a general proposition, cannot be held to the same standard as that of licensed professionals. *See Schoonover v. Consol. Freightways Corp.*, 147 F.3d 492, 497 (6th Cir. 1998) (Kennedy, J., dissenting) ("[U]nion representatives are not lawyers. They do not have the advantage of discovery procedures."), *cert. denied*, 525 U.S. 1139 (1999); *Poole v. Budd Co.*, 706 F.2d 181, 185 (6th Cir. 1983) ("Union representatives are not to be strictly held to the standards of attorneys.") (citation omitted). This observation is simply a restatement of the well-established legal understanding that: "[o]nly those important or tactical decisions made by a union official at arbitration that exhibit arbitrary or discriminatory conduct, or actions taken in bad faith, constitute breach of a duty of fair representation." *Walk*, 958 F.2d at 1326-27 (citation omitted).

Once an employee successfully demonstrates that the union acted contrary to its legal duty, the employee must then show that the union's actions or omissions "tainted the grievance procedure such that the outcome was more than likely affected by the Union's breach." *Dushaw v. Roadway Express, Inc.*, 66 F.3d 129, 132 (6th Cir. 1995) (citation omitted). The impact of the union's breach must be substantial such that the plaintiff "must meet the onerous burden of proving that the grievance process was 'seriously flawed by the union's breach . . . .'" *Black*, 15 F.3d at 585 (quoting *Hines*, 424 U.S. at 570).

a. *Union's Breach of its Duty of Fair Representation*

Garrison's allegation of breach against Local 327 can be separated into two categories: (1) those actions concerning the failure to ensure that Cassens was notified of Garrison's intent to follow the Nissan work, and (2) those actions concerning the failure to prepare for and challenge Cassens's argument as to the thirty-day reporting rule. The first category cannot give rise to liability.[9] Accordingly, our focus shifts to the second. Garrison primarily points to three errors in the union's handling of the issue of the thirty-day rule to support a finding of arbitrary conduct. First, he argues that it was arbitrary conduct for Neal not to notify Garrison that Cassens had raised a new defense at the August 1996 proceeding in New Orleans. Second, Garrison maintains that Neal's failure to

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[9] Garrison prevailed on this issue before the NJSSC and hence any alleged breach could not have tainted the committee's decision. As the NJSSC found, "Mr. Garrison made a timely request for employment consistent with this Committee's prior decision . . . and this request was acknowledged by Cassens's terminal manager, [Firkus]."

prepare a rebuttal in anticipation of Cassens's thirty-day rule defense amounted to arbitrary conduct. Last, he argues that it was also arbitrary behavior for Neal not to argue against the applicability of the arbitral precedent relied on by Cassens at the NJSSC proceeding in California. Although Neal acted with less than full professionalism, there was insufficient evidence from which the jury could conclude that his errors rose to the level of "extreme arbitrariness."

Neal first learned of the thirty-day rule at the New Orleans proceeding when Cassens invoked the rule as an affirmative defense to defeat Garrison's grievance. It is undisputed that prior to this hearing, and during his relatively short tenure (i.e., twenty months) as Local 327's business agent, Neal had never dealt with, or otherwise been made aware of, the little-known thirty-day rule. As Garrison himself concedes, the thirty-day "rule was one [Neal] had never heard of in all of his years with the union." Garrison also recognizes that at the time of his grievance proceedings, the thirty-day rule was rarely invoked and even more rarely relied on as a basis to defeat a grievance. For instance, Garrison repeatedly and boldly emphasizes that he "is the only employee in the sixty-year history of car haul who ever lost his right to be on a seniority [list] because he didn't show up within thirty days." Given the relative obscurity and deceptive unimportance of the thirty-day rule, Neal's oversight in not relaying this defense to Garrison did not amount to arbitrary conduct; at worst, the error was negligence.[10] *Cf. Walk*, 958 F.2d at 1329 (explaining that a union agent's failure to investigate

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[10] At trial, Neal testified that he simply did not recall the thirty-day rule argument being advanced by Cassens at the New Orleans proceeding. The record indicates that at times, Neal has been in charge of sixty to seventy grievances a month.

adequately a grievant's case before submission to arbitration was negligent, but not in and of itself arbitrary); *Olsen v. United Parcel Serv.*, 892 F.2d 1290, 1295-96 (7th Cir. 1990) ("While we can imagine situations in which a union's failure to investigate might constitute substantial evidence of a breach, the mere failure to investigate, in itself, does not constitute a breach of the duty of fair representation.").

Approximately forty-eight hours prior to the NJSSC proceeding, Neal, Garrison, and Joe Clark of Cassens came together to swap documents that would be presented to the committee. Among the items exchanged were the seven arbitral precedents that Cassens intended to rely on in support of its thirty-day rule defense. Garrison and Neal reviewed these decisions and were of the view that the defense was inapplicable to Garrison's grievance.[11] Accordingly, Neal and

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[11] Garrison insists that there is no evidence that Neal and he evaluated the arbitral decisions provided by Cassens or that they believed that the decisions were inapplicable to his grievance. However, the record indicates that Garrison clearly testified on cross examination that both Neal and he reviewed the arbitral decisions submitted by Cassens, and were of the view that the decisions were inapplicable to Garrison's situation. Specifically, Garrison testified as follows:

> Q: My question to you was: You [i.e., Garrison] had them on Sunday, and did you have an opportunity to look at them between Sunday and Tuesday, when the hearing takes place?
>
> A: The answer to your question is yes.
>
> Q: Okay. And you, in fact, did review those decisions, didn't you?
>
> A: I did look at them, yes, sir.
>
> Q: And Mr. Neal also looked at those decisions, didn't he?
>
> A: Yes, sir.

Garrison did not prepare a response to this defense. Neal's decision not to research and prepare a response to a defense that he believed was inapplicable to the grievance he was handling is a tactical decision subject to deference. After evaluating the decisions submitted by Cassens--and determining they were irrelevant or distinguishable from Garrison's claim--it was in Neal's discretion to determine how he wanted to expend his time, efforts, and resources in continuing to prosecute Garrison's grievance. If Neal determined that a change in strategy was not warranted, a conclusion that Garrison concurred with, then unless discriminatory, wholly irrational, or made in bad faith, it is not for us to second guess the wisdom of the decision. Moreover, like other contexts where we engage in *post hoc* evaluation of conduct, we must be ever vigilant to avoid the distorting effects of hindsight. Although Neal's decision not to obviate or otherwise prepare a rebuttal to the thirty-day rule proved to be a devastating error, the error can at worst be viewed as a miscalculation of strategy. Certainly, independent research and consultation would have been the preferable course of action, particularly when such research may have uncovered the Avon Lake arbitral precedent that supported Garrison's grievance. However, as our case law makes clear,

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Q: And both of you came to the same conclusion, which was that you felt, in your judgment that those decisions were different than your situation; correct?

A: We felt that those decisions had nothing to do with our case. That's what I felt, and that's what he [i.e., Neal] told me that he felt.

* * *

Q: So both you and Mr. Neal decided, after reviewing the cases and determining them to be not applicable, to go forward with the hearing on November 5th; correct?

A: Yes, sir.

"an unwise or even an unconsidered decision by the union is not necessarily an irrational decision." *Walk*, 958 F.2d at 1326.

In *Walk*, a plaintiff brought a hybrid § 301 suit alleging that he was wrongfully discharged due to an erroneous drug test result that indicated a positive finding of marijuana. The plaintiff argued numerous errors in the union's handling of his arbitration proceedings. The most difficult issue was whether the union's failure to challenge the clinic's method of collecting and sealing the specimen, a method that was not in compliance with the procedures outlined in the collective bargaining agreement, amounted to breach of the duty of fair representation. Under existing case law from the Northern District of Ohio, a defect in the mandated chain of custody arguably could serve as a basis to set aside a discharge resulting from a drug test violation. *See id.* at 1329. Accordingly, we had to consider whether the union's failure "to raise this issue in a timely fashion may have constituted more than mere negligence, and whether not raising the chain of custody issue may have been far outside a wide range of reasonableness because it may well have made a difference in the outcome of [the plaintiff's] grievance." *Id.* (internal quotation marks omitted). Although recognizing that the issue was a close call, we held that the error did not rise to the level of breach. Specifically, we found that

> The chain of custody issue is the most difficult of those raised by Walk. Failure to challenge the procedure did not involve a mere tactical decision by Local 299, and it did not involve a large expenditure of funds. It presents a very close question, but we are persuaded that this failure was more of an omission or oversight, a negligent error of judgment that was not directed against plaintiff capriciously or in bad faith.

> We accordingly conclude, despite some reservation, that this conduct was not outside the *O'Neill* standard under all the circumstances.

Id. Thus, *Walk* presented a much more difficult question than the case at bar because unlike the situation here, in *Walk*, the union's decision not to research and present a particular defense was not even the product of a tactical decision. Here, Neal's decision not to prepare a response to the applicability of the thirty-day rule was a tactical decision subject to deference. Accordingly, there was insufficient evidence to support a finding of arbitrary conduct on this issue.

Last, Garrison maintains that it was arbitrary behavior for Neal to sit silent during the NJSSC hearing and not challenge the arguments made by Cassens in support of the applicability of the thirty-day rule. Again, although Neal's muteness was not the most effective method to assist Garrison in his grievance, it was not so unreasonable to constitute sufficient evidence of breach of the duty of fair representation; at worst, it was negligence. *See Black*, 15 F.3d at 584 ("As the Supreme Court has made abundantly clear, a plaintiff will not succeed if he can show only slightly unreasonable behavior on the part of the union . . . ."). The fact of the matter is that Garrison assumed primary responsibility for presenting his grievance before the NJSSC. In his capacity as chief presenter, he responded to and challenged Cassens's assertion that the thirty-day rule should defeat his claim. Before the committee, Garrison specifically argued that "I did not believe the thirty (30)-day report rule . . . is applicable, because you will find [that] in NMATA . . . seniority shall not be broken except by discharge, voluntary quit, [or more than a seven (7)-year layoff]." Given that Neal had made the reasoned judgment not to research or prepare for what he believed was an inapplicable rule, we cannot see--and Garrison has not

explained--what more Neal could have said or done before the committee other than repeat Garrison's interpretation of NMATA. Although Garrison is correct to assert that Neal would likely have more credibility than Garrison, any intervention by Neal would not have added much, if any, value to what was already argued by Garrison. Also, regardless of the arguments made at the hearing, the NJSSC panel was supplied copies of the prior arbitration decisions, and itself was able to assess the relevance of those decisions.

Without sufficient evidence that Local 327 breached its duty of fair representation, Garrison's hybrid § 301 action must fail. Accordingly, we need not address Cassens's alleged breach of the collective bargaining agreement, or the numerous other issues that Cassens has raised on appeal. Because we reverse the denial of Cassens's motion for judgment as a matter of law, we consider whether any grounds exist that might warrant a new trial. *See Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 328-29, 18 L. Ed. 2d 75, 87 S. Ct. 1072 (1967). Garrison did not request a new trial in his brief in the event we reversed the district court and has presented no reasons why a new trial should be ordered. Our review of record also convinces us that no such grounds exist. Therefore, we direct the entry of judgment as a matter of law for Cassens. *See id.* at 326 (holding that an appellate court may in its discretion appropriately instruct the district court to enter judgment against a jury-verdict winner when further proceedings are unwarranted). Accordingly, the judgment below is REVERSED, and this case is REMANDED to the district court for the entry of judgment as a matter of law for Cassens.

C. *Civil Contempt Order*

On January 7, 2002, the district court entered an order holding Cassens in civil contempt of the court's prior order of July 24, 2001. Specifically, it found that Cassens failed to timely reinstate Garrison to his job and to his rightful place on the Cassens seniority list and failed to make certain pension payments as ordered by the court. Because Garrison had already been reinstated by Cassens at the time the court issued its ruling, as compensatory damages for contempt, Cassens was ordered to pay lost wages to Garrison in the amount of $15,367.75, and to assign Garrison a company seniority date of June 10, 1996, on its roster and all records. Cassens was also ordered to pay Garrison retroactive pension contributions beginning from June 10, 1996. Because we find no basis for liability under § 301, we necessarily reverse and vacate the district court's civil contempt order in its entirety.

"Broadly, the purpose of civil contempt is to coerce an individual to perform an act or to compensate an injured complainant." *United States v. Bayshore Assocs.*, Inc., 934 F.2d 1391, 1400 (6th Cir. 1991). The purpose of a criminal contempt order, however, is "punitive"; it is "to vindicate the authority of the court." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441, 55 L. Ed. 797, 31 S. Ct. 492 (1911). "The general rule is that whether a contempt judgment survives the avoidance of an underlying order depends on the nature of the contempt decree. If the contempt is criminal it stands; if it is civil it falls." *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1342 (3d Cir. 1976) (citation omitted).

As the Supreme Court has long held

> It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. *The right to remedial relief falls with an injunction which events prove was erroneously issued* . . . .

United States v. United Mine Workers, 330 U.S. 258, 294-95, 91 L. Ed. 884, 67 S. Ct. 677 (1947) (emphasis added). In a similar vein, we have also explained that

> A conviction for criminal contempt may indeed survive the reversal of the decree disobeyed; the punishment is to vindicate the court's authority which has been equally flouted whether or not the command was right. But the same cannot be true of civil contempts, which are only remedial. It is true that the reversal of the decree does not retroactively obliterate the past existence of the violation; yet on the other hand it does more than destroy the future sanction of the decree. It adjudges that it never should have passed; that the right which it affected to create was no right at all. To let the liability stand for past contumacy would be to give the plaintiff a remedy not for a right but for a wrong which the law should not do.

Blaylock v. Cheker Oil Co., 547 F.2d 962, 966 (6th Cir. 1976) (quoting *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 86 F.2d 727, 727 (2d Cir. 1936) (per curiam)).

In the instant matter, in imposing sanctions, the district court focused exclusively on compensating Garrison for the losses he sustained as a result of Cassens's alleged contempt. The court's narrow focus leaves no doubt that the contempt order at issue is remedial in nature. *See Latrobe Steel Co.*, 545 F.2d at 1344 ("Remedial or compensatory actions are essentially backward looking, seeking to compensate the complainant through the payment of money for damages caused by past acts of disobedience.") (citations omitted). That being so, and having already determined that there is no basis for liability in the underlying action, then pursuant to controlling authority, the district court's compensatory contempt order can no longer stand.

III. CONCLUSION

We **REVERSE** the jury verdict and **REMAND** to the district court for the entry of judgment as a matter of law for Cassens in case No. 01-6056. In case No. 02-5124, we **REVERSE** and **VACATE** the district court's contempt order in its entirety.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Case No. 3:98-0415
[Filed Aug. 2, 2001]

AMENDED JUDGMENT IN A CIVIL CASE

DAVID L. GARRISON	)
	)
vs.	)
	)
CASSENS TRANSPORT CO.	)
	)

O Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict as reflected in the verdict form filed July 12, 2001 (Docket Entry No. 240) and found as follows:

1) The plaintiff had established by a preponderance of the evidence that Local Union 327 breached its duty of fair representation in handling the plaintiff's grievance against Cassens.

2) The Union's breach of duty did seriously flaw the grievance process such that it is more likely than not that the decision of the National Joint Standing

Seniority Committee would have been different had the breach of duty not occurred.

3) The plaintiff had established by a preponderance of the evidence that Cassens Transport Co. breached Article 5, Section 3 and/or Article 5, Section 4(c) of the National Agreement by failing to employ the plaintiff in June of 1996 at the Smyrna, Tennessee Terminal.

4) The jury awarded back pay damages in the amount of $408,885.00 to the plaintiff and that amount should not be reduced any further for actual earnings and/or the plaintiff's failure to mitigate his damages.

5) The jury determined that 75% of the plaintiff's back pay damages should be apportioned to the company and 25% of the plaintiff's back pay damages should be apportioned to Local 327.

6) The jury found that the plaintiff proved by a preponderance of the evidence that he is entitled to receive punitive damages in the amount of $500,000.00 from the defendant.

In accordance with the jury verdict and the court's rulings on July 24, 2001 by separate order, it is hereby ORDERED that:

1) The plaintiff shall recover from the defendant Cassens Transport Co. $306,663.75 in back pay damages and $500,000.00 in punitive damages.

2) The defendant Cassens shall immediately reinstate the plaintiff as a car-haul driver, with a terminal seniority date of September 25, 1980.

3) Cassens shall pay into the Central States Pension Fund all payments necessary so that Mr. Garrison's pension record reflects no break in service. These payments will be credited to Cassens and deducted from the back pay damages awarded by the jury.

IT IS SO ORDERED AND ADJUDGED.

ENTER this 2nd day of August 2001.

ROGER A. MILAM, CLERK
/s/
BY BETTY BRIGGS-JONES
DEPUTY CLERK

APPENDIX D

NATIONAL MASTER AUTOMOBILE TRANSPORTERS AGREEMENT

(NMATA)

For The Period Of

May 22, 1995

thru

May 31, 1999

Contained Herein Are Selected Portions Of The National Master Automobile Transporters Agreement

A "Current Term" contract is obtainable by going online to www.Teamsters.org/divisions/auotrans/contracts.htm and then double-click on "Carhaul National Master Agreement", by doing so you will then receive a complete downloadable "National Contract Document", in PDF format.

ARTICLE 5. SENIORITY

Article 5., Section 1. Definition of Terms

"Company seniority" is a term that is applied to an employee's date of hire by the employer.

"Terminal seniority" is a term that is applied to the employee's most recent date of employment at a specific terminal.

"Dovetail seniority"[1] is a term that is applied when two (2) or more seniority lists are merged or combined into a single seniority list which recognizes the terminal seniority date of each employee. The list is arranged by terminal seniority date with the most senior employee at the top.

"Endtail seniority" is a term that is applied when an employee or group of employees are placed at the bottom of a terminal seniority list although they retain their company seniority date for fringe benefits.

"Terminal" is a term that is applied to any facility of an Employer to which employees are assigned to work whether called a branch, terminal, division or operation.

"Fringe Benefits", as used in this Article, is a term that shall apply to vacation accrual only.

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[1] The bolding of type did not appear in the original document, but is provided to direct the attention of the reader to significant words and terms that are discussed in this law suit.

Article 5., Section 2.

Terminal seniority rights for all employees covered by this Agreement shall prevail unless the Supplements or other provisions of this Agreement provide specifically to the contrary. Because of the nature of the transportation industry in which employees transfer during the term of their employment in the industry from one location to another as the flow of business requires, there are two (2) levels of seniority recognized by this Agreement. These levels are known as "company seniority" and "terminal seniority" as defined in Section 1.

The extent to which seniority shall be applied and accrued as well as the methods and procedures of such application shall be clearly set forth, in writing, in this Agreement and in the Supplemental Agreements, including approved Local Riders.

Article 5., Section 3.[2]

(a) **Seniority**, including for fringe benefits, **shall only be broken by discharge,** [3] **voluntary quit,**[4] **more than a seven (7)-year layoff,**[5] except as otherwise provided herein or for

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[2] The bolding of type did not appear in the original document, but is provided to direct the attention of the reader to significant words and terms that are discussed in this law suit.

[3] Garrison was not "discharged".

[4] Garrison did not "voluntarily quit".

[5] Garrison was not on "Layoff".
Garrison's name should have been put on Cassens seniority list in 1994, along with all the other Allied drivers that decided to follow the traffic to Cassens from Allied

such greater period than seven (7) years as the appropriate Joint Arbitration Committee may direct during the seventh (7^{th}) year. This provision shall be uniformly applied throughout all Supplemental Agreements to the National Master Automobile Transporters Agreement.

(b) Leave of Absence for Union Activities (omitted)

Article 5., Section 4.

Seniority lists are **dovetailed** in the following circumstances:

When the same Employer merges two (2) or more terminals;

a. When commonly owned separate Employers merge two (2) or more terminals;

b. When two (2) or more Employers share traffic from the same shipper at the same location and the traffic of one (1) of the Employers is canceled by the shipper and it is assigned to one (1) of the remaining Employers, whether or not there is a financial transaction of any kind involving the affected Employers. At port facilities, the canceled Employer must have regularly handled the traffic for a period of at least six (6) months for this provision to apply.

c. When two (2) or more terminals are merged after an Employer enters into a major financial transaction such as a merger, purchase, acquisition, sale or similar transaction with

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Systems. Garrison was off work due to an OJI and his name merely should have been "Dovetailed" on the new list in 1994, as was decided by prior directives of the NATJAC Committee in the Avon Lake Decision of 1992.

another Employer. It is immaterial whether the transaction involved merely the purchase of stock of one (1)corporation by another, with two (2) separate corporations continuing in existence.

(e) The above rules shall not apply to the acquisition of a wholly separate and independent company, the operations of which are conducted separately from other operations covered by this Agreement.

Article 5., Section 5.

a. In the event a shipper cancels its business relationship with an Employer at a location and transfers all or part of that business to another Employer which is not servicing that shipper at that location, whether or not there is a financial transaction of any kind involving the affected Employers, both the active and the laid-off employees of the canceled Employer at that terminal shall be placed on a master seniority list. Those employees who accept employment with the successor employer shall be given a new company seniority date. This new company seniority date shall be the date used for work opportunities at any of the successor Employer's location except the employee's original terminal. However, the employee shall retain his prior company seniority date for fringe benefits. At port facilities the canceled Employer must have regularly handled the business for a period of more than six (6) months.

(b) Employees of the canceled Employer who remain on layoff after all of the seniority rights contained in Sections 4 and 5(a) have been exercised shall remain on layoff status at their home terminal with recall rights unimpaired. They shall be afforded additional help opportunities at other locations by both Employers. For work opportunities at its other location

the successor Employer must exhaust its obligations to its existing laid-off employees before offering opportunities to employees of the canceled Employer. If an employee accepts employment under this subsection with the successor Employer, a new company seniority date shall be given and there shall be no further obligation of the canceled Employer. However, the employee shall retain his prior company seniority date for fringe benefits. If the employee selects employment at another location of the canceled Employer, there shall be no further obligation of the successor employer to that employee.

Article 5., Section 6. thru 9. (omitted)

Article 5., Section 10.

Notices of Changes Which Affect Seniority

When a change is made by an Employer which affects the seniority rights of its employees as provided in this Article, the Employer shall give the affected Local Union(s) reasonable notice in advance of the change. The Employer and Local Union(s) shall cooperate in assisting the appropriate Area Joint Arbitration Committee or National Committee in determining the seniority of the employees affected in accordance with the terms of this Agreement. Such determination shall be final and binding on the Employer, the Local Union(s) and the employees.

ARTICLE 7. GRIEVANCE MACHINERY

Article 7., Section 1. thru 17. (partially omitted)

Article 7., Section 4. Step 4.

The Local Union and the Employer shall conduct a local-level hearing after the foregoing steps have been exhausted. Scheduling of the local-level hearing will be by mutual agreement but it is to take place as soon as possible but no later than thirty (30) days after the Employer's written response to the grievance to discuss and attempt to resolve the grievance. If the grievance is not resolved at the local-level hearing, either party has the right to file the grievance with the appropriate Joint Arbitration Committee within fifteen (15) days after the local-level hearing.

During the local-level hearing and prior to docketing the grievance with the Joint Arbitration Committee, the business agent and Employer representative shall designate in writing that the grievance has been examined by both parties. This document must be attached to the grievance if it is filed with the Joint Arbitration Committee. Failure of the Local Union and the Employer to comply with this requirement shall preclude the docketing of the grievance and it shall be returned to the parties to comply with this requirement.

Any party to a grievance who intends to use a decision of any Joint Arbitration Committee as precedent must present a copy of the decision to the other party as soon as possible prior to the presentation of the case to the Committee.

Article 7., Section 18. **Grievant's Bill of Rights**[6]

All employees who file grievances under the Agreement and its Supplemental Agreements are entitled to have their cases decided fairly and promptly. In order to satisfy these objectives and promote confidence in the integrity of the grievance procedures, all employees who file grievances are entitled to the following rights:

1. Grievants and Stewards shall be informed by their Local Union of the time and place of the hearing.

2. Grievants and Stewards are permitted to attend, at their own expense, the hearing in cases in which they are involved, unless otherwise agreed to by the Employer and Local Union.

3. The Employer shall provide any pertinent and relevant information identified with reasonable specificity within fifteen (15) days of receipt of a written request by the Local Union, Steward or grievant.

4. All cases involving seniority or a discharge shall be recorded, except for executive sessions. Transcriptions of these proceedings shall be prepared in response to written requests by the Local Union at the reasonable cost of transcription, which shall be borne by the employee or party making the request.

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[6]The bolding of type did not appear in the original document, but is provided to direct the attention of the reader to significant words and terms that are discussed in this law suit.

5. A grievant or Steward may request permission to present argument in support of the case in addition to the evidence or argument presented by the Local Union.

6. All Joint Committees shall provide written decisions describing the reasons relied upon in reaching the decision.

7. Cases may not be postponed only by mutual agreement between the Local Union and Employer.

8. A copy of the Joint Committee Rules of Procedure, including the Grievant's Bill of Rights, shall be provided by the Joint Committee upon request of the grievant prior to the commencement of the Joint Committee hearing.

End of Selected Portions of the:

National Master Automobile Transporters Agreement
(NMATA)

A "Current Term" contract is obtainable by going online to www.Teamsters.org/divisions/auotrans/contracts.htm and then double-click on "Carhaul National Master Agreement", by doing so you will then receive a complete downloadable "National Contract Document", in PDF format.

APPENDIX E

AVON LAKE DECISION

NATIONAL AUTOMOBILE TRANSPORTERS JOINT ARBITRATION COMMITTEE
(NATJAC)

Minutes of the NATJAC Meeting Held
Tuesday, Wednesday, and Thursday
May 5, 6, and 7, 1992
Scottsdale Plaza Resort, Scottsdale, AZ 85253

NATJAC No. 5-92-(2-92)-465-A

Cassens Transport Company
v
Teamsters Local Union No. 571 (Lorain, OH)
and
E & L Transport Company
and
Teamsters Local Union No. 964 (Cleveland, OH)

HEARING PANEL[1]

Employer Co-Chairperson	Union Co-Chairperson
R. Ian Hunter	Ernest Tusino
Employer Panel Members	**Union Panel Members**
Ron Borges	Charles Collins
William Hadley	James Doorhy
A. J. Kosak	Merl Kelly
Jack Nelson	Jim Roberts

RE: Request for Committee approval for procedures applicable to fine staffing of a new facility at Avon Lake, Ohio. (1992)

DISCUSSION:

Bob Eliser of Local Union 377 appeared by designation by Chuck Ayres, Local union 964 to set forth the position of Local Union 964 at this hearing. While the Local Union was advised by Cassens Transport Company ("Cassens") that is to receive two hundred fifty (250) units a day, five (5) days a week with a total 17,000 units a year at Avon Lake railramp, Local 964 believes, based upon, prior history, it will be more like 34,000 units a year. Local 964 was informed by Cassens that seven (7) of its members from E & L Transport's ("E & L") Lorain terminal were working at the Avon Lake railhead. There should be at least twenty five (25) to thirty (30) drivers

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[1] The bolding of type did not appear in the original document, but is provided to direct the attention of the reader to the fact that these persons participated in both, the Avon Lake Decision of 1992 and the Dana Point Decision of 1996.

working at this location in due time. The Local Union claims that 30 percent of the vehicles delivered from the railhead are 400 hundred miles or more. Trips of this distance are more than a day's work. The Local Union also believes that Cassens is presently employing thirty (30) Cassens drivers at the railhead to handle the backlog of cars. This is another reason why the Local Union believes that Cassens needs more employees from Lorain to handle the rail traffic previously handled by the E & L Lorain drivers.

In addition, the Local Union asked that the Committee direct that sick pay, personal holidays and other fringe benefits be prorated by the Companies in accordance with the contract. The Local Union asked the Committee to retain jurisdiction until more accurate data is available to determine the true number of drivers required by Cassens to handle the former Lorain railhead traffic, the work which the Local 964 and E & L members are entitled to perform.

Charles Lee appeared on behalf of Local Union 299.[2] He asked that if the seniority rights of E & L Woodhaven drivers were directly affected by the opening of the Avon Lake facility their rights be protected. At this time the Local Union is not aware of any specific facts which would justify such application, but asked the Committee to retain jurisdiction until, the full extent of the impact of the opening of the Avon Lake facility on Woodhaven could be ascertained.

Jim Walker appeared on behalf of Cassens.[3] He indicated that tile Company had just begun to operate out of Avon Lake

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[2] **Charles Lee**, was a Panel Member of the Dana Point Decision of 1992.

[3] **Jim Walker**, Labor Representative for Cassens.

(also known as Sheffield). A substantial delay in the opening of the railhead had occurred, and thus, the Company could not implement until very recently the decision rendered by the National Committee in Case 465 at its October 21-23, 1991 meeting, Had the railramp operated in advance of the plant opening, it would, have permitted the Company and Local Union to ascertain more precisely the level of traffic associated with the railramp. However, both the railramp and the plant commenced to operate concurrently. Thus, the rail traffic will have to be isolated from the plant traffic to determine how many E & L Lorain drivers are entitled to transfer to the Avon Lake facility. This is because the National Committee's earlier decision had separated the rail traffic from the plant traffic and had awarded seniority rights to the E & L Lorain drivers only for the railramp traffic. Cassens drivers were awarded the fight to bid the plant traffic.

Cassens presently estimates that they will need twelve (12) Lorain drivers to handle the rail traffic diverted from the Lorain rail ramp. The Company does not yet know the number of drivers it will need for the plant traffic. The Company reviewed the number of units received by it during the eight (8) day period it operated out of the railramp. This data revealed the company had received, an average of 1.15 units a day. Since many of the trips are short in distance, a driver will be able to haul more than one load a day. This is the basis of Cassens contention it will need no more than twelve (12) E & L Lorain drivers.

When questioned, **Mr. Walker [Cassens Transport Co.]** noted that one hundred fifty (150) E & L Lorain drivers had bid the Avon Lake facility. The Company estimates that it will load ten units a load and that 40 percent of the Avon rail traffic is for the Cleveland zone.

In addition to the number of E & L Lorain drivers entitled to work at the railhead...

Cassens [Mr. Walker] asked for clarification as to how long the Company is obligated to afford work at the Avon Lake facility to an E & L Lorain driver presently on a leave of absence due to an on-the-job injury.[4]

Perchie Adkins appeared on behalf of E & L. He indicated he wanted consideration given to modifying application of the 20 percent rule at the E & L Lorain terminal given the loss of its business to the Cassens Avon Lake facility and other factors in order to utilize backhauls from the terminal in the future.

MOTION:

That based upon the facts and evidence presented, the Committee decides as follows:

The Committee's original, decision in Case No. 10-91-465 is hereby affirmed. The Company is instructed to continue to staff the rail and plant facility in accordance with that decision during the next ninety (90) days. The parties are instructed to report back to the Committee in writing the action taken by the Company to implement the decision at the August 1992 meeting, at which time the Committee will determine whether to end or extend the window period.

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[4] Cassens knew what to do with Garrison in 1994, because in this decision, the Avon Lake Decision of 1992, Cassens asked the NATJAC Committee for clarification, as what to do when an employee is off work on compensation status and that employee elects to "Follow The Work" to the surviving company.

With regards to the E & L employee on workers' compensation[5] who has elected to transfer to Cassens, he is to be deemed as transferred and will hold seniority at Avon Lake and will be permitted to assume an active position upon his release from compensation status[6]

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[5] This Avon Lake Decision of 1992, **established the standard** and instructed Cassens and all signatories of NMATA, as what to do in the future, when under Article 5, Section 4, or Article 5, section 5, an employee is off work on compensation status elects to "Follow The Work" to the surviving company.

[6] When NATJAC orders the "Dovetailing" of the two (2) seniority lists mandated in NMATA Article 5, Section 4, or Article 5, Section 5, and when that employee who is currently not working and who is on compensation status, due to an on-the-job injury or sickness, elects to "Follow The Work", to the new NMATA Employer, that employee's name is "Dovetailed" along with all the other drivers' of both companies being mereged, into a new master seniority list. (ref. NMATA, Article 5, Section 5 (a)), and noted beside his name are the words "Compensation Status" or "Off on Injury".

Having ones name on the seniority list is the only way one can hold seniority at any location.

After the effected worker obtains a medical release from compensation status, that worker merely returns to work and resumes his regular duties with the new NMATA Employer.

In this manner, **employees who just happen to be on compensation status,** when the shipper (Nissan) decides to transfer traffic from one NMATA Employer (Allied Systems) to another NMATA Employer (Cassens), the effected employees **are not discriminated against merely because that employee just happened to be off on compensation status during the time of traffic transfer.**

With respect to vacations, sick pay, personal holidays and other fringe benefit obligations, the Companies and Local Unions are instructed to exchange the information necessary to enable E & L Transport to make the appropriate pro-rata payments to its employees who elect to transfer to Cassens with respect to each of the above contractual obligations for the period ending on the date that each such employee is put to work at Cassens. Cassens, thereafter, shall, assume these obligations, also on a pro-rata basis, effective on the date that each such employee is put to work.

MOTION CARRIED.

APPENDIX F

BEFORE THE

NATIONAL JOINT STANDING SENIORITY COMMITTEE

Case No. NJSSC-11-96-(9-96)-38

IN THE MATTER OF:	)
LOCAL 327 (NASHVILLE)	)
	)
VS.	)
	)
CASSENS TRANSPORT COMPANY	)
	)

Tuesday, November 5, 1996 at the Laguna Cliffs Resort
Dana Point, California

EMPLOYER PANEL MEMBERS
R. Ian Hunter, Co-Chairperson
Ron Borges
William Hadley
Anthony LaBue

UNION PANEL MEMBERS
J.D. Jackson, Co-Chairperson
Charles Lee
Timothy Lehman
Fred Zuckerman

CASSENS TRANSPORT COMPANY REPRESENTATIVES:
Allen Cassens
Joe Clark

LOCAL 327 REPRESENTATIVES-
Jimmy Neal
David Garrison, Grievant

[p.25]

down through that list again. On Exhibit One (1) or Two (2), Mr. Garrison's name is not on it. A clerical error or mistake was made in that -- if you go to Ailied's seniority list -- Exhibits Three (3), A (3a), B (3b), and C (3c) -- the only thing that we can figure is that the 9-25-80 date was picked up -- picked up off of this list which was not a list given to us, because you can see the way it was issued. We were going through this list -- when we were going through -- in our home office, to make sure that we had the correct dates. As you can see on Exhibit Three (3) where people were told what to use for the fringe date and what to use for the terminal date and what to use for the Company date. That's how the dates got messed up. Gentlemen, Exhibit Four (4) in your package is, in fact, the release that Mr. Garrison brought to us. And you can see that the release is dated 6-7-96. And you can also see that -- that release does say able to return to work with the following restrictions and the restrictions are duties as tolerated. And then the Company couldn't get a medical release to full duty, So therefore, based upon that, we couldn't return Mr. Garrison to work. Item Five (5), you'll see Mr. Garrison's letter to Mr. Barlow, the business agent of record for Local 327. Agent Barlow never notified Cassens Transport that, in fact, Mr.Garrison wanted to come to us from Allied and that includes me and Jim in Smyrna too. You

also have as part of Exhibit Five (5) -- Cassens Transport Company was not, in fact, copied on this correspondence. Nor were we presented with the letters that he claimed that he wrote back to Edwards --

[p.26]

you will find that we were not copied either. At no time, since October 1994 to June of 1996, did Mr. Garrison ever contacted Cassens Transport. Until I guess, he wished he'd come to us, or he thought he had a right to come to us -- or any thing, shape, form, or fashion which would be on our Seniority list. Exhibit Six (6), gentlemen, and Six A (6a) - the last seniority list posted by Cassens Transport Company prior to any transfer of Allied drivers to Cassens Transport. And you will, in fact, find that Mr. Garrison's name is not on it. You take Exhibit Seven (7) and Seven A (7a) dated 11-11-94 is, in fact, the first seniority list where drivers who wished from Allied Systems that transferred to Cassens Transport. Again you will not find Mr. Garrison's name on it. Exhibits Eight (8) and Eight A (8a) dated 11-15-94 is a list showing when additional Allied drivers came on duty to the Cassens board through the decision of 801-A. Again, you will not find Mr. Garrison's name on it. Exhibits Nine (9) and Nine A (9a) dated 1-4-95 -- again, it's the seniority list that was posted. Again, you will not find Mr. Garrison's name on it. Exhibits Ten (10) and Ten A (10a) dated 1-10-95 -- it is, in fact, again, the seniority list of Cassens Transport. And again, you will not find Mr. Garrison's name on it. Exhibits Eleven (11) through Thirteen (13) are, in fact, representative of every six (6) months -- we show you in here a copy of the seniority list that we ran and posted. And nowhere is Mr. Garrison's name on it. The Local Union was sent a copy of each and every one of these seniority lists. And at no time, okay, until now--until June of 1996, did the

[p.27]

Local Union ever question us or protest to us that Mr, Garrison's name was not on the seniority list. Nor did Mr. Garrison. himself, ever question us or protest that his name was not on the list. Exhibit Fourteen (14), gentlemen, is the decision in Case Number 801-A -- again heard, at such time, by this National Committee. And in this case, it was heard at the Tradewinds on St. Petersburgh Beach in January of 1995. And you will see that it's listed as Case 801-A which is the original case number. All of the parties listed on the docket were, in fact present -- which meant Cassens, Commercial, Allied – and all of their representatives were present, along with Local Union 327. At that time, there was a question as to whether the seniority list was correct or not. The decision in that case was that, in fact, it was correct, and the seniority list shall remain unchanged. At that time -- during that meeting, there was never any evidence presented, any position taken, or any protest raised where Mr. Garrison's name was not on that seniority list. That seniority list was published, based upon information supplied to us at the beginning of October of 1994. Mr, Garrison's name has never been supplied to us as being one that wished to transfer from Allied to Cassens Transport. During the local level, July 12, 1996, Mr. Hodges, the agent for Local 327, testified to all that Local 327 had participated throughout the preparation of all the lists --had seen all the lists -- in fact, they had been given from Allied to either Cassens or Commercial. And he testified in front of all at local level that he had never seen Mr. Garrison's name on any list supplied to either

* * *

APPENDIX G

Excerpted Portions of Trial Transcript

[p.86]

Q. So that would have been about 60 days after the election to follow the work?

A. Yes.

Q. And are you aware of anything that Cassens ever did to notify any drivers that they had to show up for work within 30 days or be removed from this dovetail list?

A. As it pertains to this decision?

Q. As to any driver. Was any driver -- prior to Dave Garrison showing up in June of 1996, was any driver ever informed that they had 30 days to show up or their name was going to be taken off the seniority list?

A. Not in Smyrna, that I'm aware of, no.

Q. Are you aware of it anywhere else?

A. Yes, sir, I am.

Q. Prior to 1996?

A. Oh, no, sir. No, that I was not.

Q. Okay. Thank you. Are you aware of anything that Local 327 or Allied ever did to notify any driver prior to June of 1996?

A. I would not have knowledge of Allied or what Local 327 did.

Q. Do you have a bulletin board there at Cassens?

A. Yes, sir, I do.

Q. Are things -- notices to drivers posted on that bulletin board?

[p.87]

A. Yes, sir.

Q. Was there ever anything posted to tell drivers they had to show up within 30 days or have their name taken, off the seniority list?

A. No, sir.

Q. And you, yourself, were not aware of any 30-day rule that required any drivers to show up for work prior to Mr. Garrison showing up in June of '96; were you?

A. No, sir, not at that time.

Q. If you would, sir, in the book that I gave you, would you turn to Exhibit 5, please? Will you turn to that page?

A. Yes, sir.

Q. Can you tell us what that is?

A. It is a seniority roster, with a run date or a produce date of 11/15 of 1994.

Q. All right. And Mr. Nance's name is not on there; is it?

A. No, sir; it is not.

Q. And Mr. Garrison's name is not on there?

A. No, sir, it is not.

Q. But we do have Driver Langston and Driver James on there. Do you see those lines?

A. Yes, sir; I do.

Q. And it has a WC out next to it. Can you tell us [p. 88] what that means?

A. Yes, sir. It means those two drivers are on workmen's comp.

Q. All right. Take a look at the next exhibit, Exhibit 6. And what's the date of this seniority list?

A. 1/4 of '95.

Q. And is Mr. Nance's name on this list yet?

A. No, sir, it is not.

Q. But we still have Mr. James' name with the work comp next to it; correct?

A. Yes, sir; you do.

Q. He's still off on work comp, unable to work; right?

A. That is correct.

Q. And James -- I'm sorry, Langston is down as vacation; correct?

A. That is correct, as well.

Q. So he also wasn't coming into work?

A. No, sir, he was on vacation.

Q. All right. Let's look at the next one, Exhibit 7. What's the date of this seniority list?

A. Mine in this book is 1/10 of '95.

Q. Thank you. And is this the first one where Langston -- I'm sorry, Mr. Nance's name appears?

A. Yes, sir.

Q. All right. And what's the date of Mr. -- I'm sorry, [p. 89] what did I say -- I meant Nance. This is the first time Mr. Nance's name appears on a Cassens' seniority list; correct?

A. Yes, sir; it is.

Q. And we have Langston on vacation, James still on work comp; correct?

A. Yes, sir.

Q. Did Langston or James lose their terminal seniority because they hadn't showed up for work as of January 10th?

A. No, sir, they did not. They were original members on our board, so they had already established that terminal seniority with us.

Q. And, in fact, once Nance's name was on there, he had established, terminal seniority also; hadn't he?

A. Yes, sir.

Q. And his name would never be taken off a seniority list; would it?

A. There are circumstances where it could be, under discharge or retirement, things like that, yes.

Q. I think the rule is discharge, voluntary quit, or on layoff for more than seven years.

THE COURT: Is that a question?

By Mr. Moen:

Q. Yes. Is that the rule?

A. I'm not certain about the seven years.

* * *

[p.189]

Smyrna, Tennessee.

Q. How long have you been a driver in automobile transport?

A. About 21 years and 3 months, I'm sorry, 20 years and 3 months.

Q. And are you presently still employed with Cassens?

A. Yes, I am.

Q. Do you know what number you are on the seniority board?

A. I'm currently number 5.

Q. Do you know where David Garrison would be had he come to Smyrna in June of 1996 in relationship to you on the board? Would he be one notch above you?

A. I think he would be two notches above me, Mr. Garrison, I believe, would be number 3 or 4.

Q. And that would bump you down a notch?

A. Correct.

Q. All right. And were you employed at Smyrna, Tennessee, with Allied in October, November of 1994, when the committee decision came down and drivers were given the choice to transfer from Allied to Cassens or Commercial Carriers?

A. I was given the choice, and I chose Cassens Transport.

Q. And at the time that you chose Cassens, were you off [p. 190] on a work related injury?

A. Yes, sir, I was.

Q. How long had you been off at that time?

A. Approximately four months.

Q. And what was your injury?

A. Rotator cuff on the left shoulder.

Q. And did you injure that while you were loading cars?

A. Yes, sir, I did, with Allied Systems.

Q. Is the car-haul business -- would you say it's a somewhat dangerous occupation for truck driving?

A. Very much so.

Q. Are there a fair number of injuries?

A. Overabundance of injuries, yes.

Q. And is that caused by the nature of the car-haul business, itself?

A. True. It's a dangerous occupation.

Q. All right. At the time that you elected to follow the work to Cassens, did you notify Mr. Edwards of your choice?

A. Yes, sir, I did.

Q. Did you have any contact with Cassens notifying them that you wanted to follow the work, or did it all go through Allied?

A. No, sir, I did not.

Q. All right. So you were off on work comp, you [p. 191] elected to go to Cassens, and then what happened next?

A. Well, that was prior to Allied Systems losing their business when their contract was up. When it was up and everyone went to Cassens that chose to go, they had an orientation. And by the word of mouth contact of my friends that was employed with Allied Systems, they told me I had better go over there and talk to them people.

Q. All right. It wasn't Cassens that notified you. It was through word of mouth from a friend?

A. Correct.

Q. And you went over to Cassens, and you filled out their paperwork, and you applied for the job?

A. Correct.

Q. And you notified them in that paperwork that you were off on a work related injury and you could not work. Isn't that true?

A. Nothing was made out -- no, not in paperwork. It was a verbal. I advised them that I was off.

Q. And it was certainly clear -- you made it clear to Cassens that you were unable to pass a DOT physical and drive a truck in November of '94?

A. That is correct. I was still under a doctor's care.

Q. And you, in fact, did not take a driver's test in November of 1994; did you?

A. No, sir, I did not.

[p. 192]

Q. And why was that?

A. Because I had not been released from the doctor to perform any duties.

Q. Did anyone at Cassens or Allied or Local 327 tell you that you had a 30-day window that you needed to show up for work or you would lose your right to transfer to Cassens?

A. No, sir, they did not.

Q. Did you, in fact, then later start pulling a load for Cassens?

A. Yes, sir, beginning January the 9th of 1995.

Q. And that was the first load that you pulled for them?

A. Yes, sir.

Q. When did the doctor release you and give you a medical release that was adequate for you to return to work?

A. I believe it was in the first week of January when I actually got my release.

Q. And took it to Cassens and –

A. Pardon?

Q. Did you take it to Cassens and show them that you had the release?

A. Yes, I did.

Q. Then you had to take the DOT physical?

[p. 238]

A. I did.

Q. This second medical release?

A. I did.

Q. Did you give it to Mr. Clark?

A. Yes, I did.

Q. Did he read it?

A. I suppose he did, He looked at it, and he said, "This is not a valid release."

Q. What did you say then?

A. Well, he added, he said, "You're going to have to be checked by our doctors." He said, "This release doesn't mean anything."

I said, "Well, the man that wrote this release is a spine surgeon. In fact, he is the patent-holder on the drill that drills the holes in your back when you go through a back operation."

He said, "I don't care who he is. You've got to see our doctor." I said, "Well, I'm ready right now." I had offered several times in the first meeting and this meeting. "I'm ready to take a DOT physical now." I drove a truck to the hearing.

Q. On this July 12th--

A. Yes, sir.

Q. An 18-wheeler when--

A. And. I had a valid DOT physical in my pocket. I had [p.239] already been cleared. Had got it when I was in Columbia by another doctor.

Q. Did you also have at this July 12 prehearing those two letters that were signed by Firkus?

A. Yes, sir.

Q. So when Mr. Clark saw your medical release and the documentation from Firkus, did he say, "Well, okay, we will have to put you back to work?"

A. No, sir, there was-- that meeting lasted about an hour or so. And the gist of the conversation was, you know, why

didn't you call us, why didn't you send a letter, this medical release isn't good enough, you are going to have to get a release from your doctor; by the way, sign this piece of paper, we want all your medical files from Allied before we go any further.

And I really objected at that point, I said, "This meeting is about seniority. It's not a matter about whether I'm fit to do the job or not, even though I'm ready to take a physical and prove it." And he said, "well we ain't going to do it." And at that--

Q. Did you-- I'm sorry, go ahead.

A. At that point, I had missed about $7,000 worth of

Q. In between these two dates?

A. In between the June 11th and the July 12th date, [p. 247] to have to get their doctor, but the main point was that I had never made election, which was just clearly patently untrue.

Q. In between August and November, did anyone tell you that they were advancing some 30-day rule or some 30-day window of opportunity that you had missed?

A. I had never heard about a 30-day rule until I got out to Dana Point in November.

Q. Did you submit your packet of information? I think we looked at it-- I have forgotten-- Exhibit 9-- no–

A. Number 8.

Q. Yeah, Exhibit 8, your presentation that we looked at, did you submit that to Mr. Neal prior to going to Dana Point so he could look at it to give you any suggestions or advice on what information or evidence you could put in?

A. Yes, sir.

Q. What did he tell you?

A. He said, "Looks like you've got it all summed up."

Q. And in the presentation that you prepared for this Dana Point hearing, was there anything in there about the 30-day rule?

A. No, sir.

Q. Why?

A. Didn't know about it. I didn't know they was going to use a 30-day rule; never heard of it. It was invented.

[p. 248]

Q. You show up at Dana Point, California, and Mr. Clark is there; correct?

A. Yes, sir.

Q. And he gives you some committee decisions?

A. Yes, sir.

Q. And he walks off?

A. Yeah, we met him out in front of the hotel. I saw him there. And he handed them to Jimmy, and Jimmy handed them to me, and he said, "What do you think?"

Q. Well, did Mr. Clark, when he gave them to you, did he say, "Well, we are relying on the 30-day rule, Mr. Garrison or Mr. Neal?" Did he say that?

A. No, sir. He said -- best of my recollection, he said, "Jimmy, we're going to use these cases in Mr. Garrison's case."

Q. When was the first time you heard those words come out of some human being's mouth, that there was a 30-day rule that precluded you from employment with Cassens?

A. Joe Clark.

Q. When?

A. In the meeting.

Q. In the testimony part of the meeting?

A. Yes, sir. He never said, "You know about the 30-day rule; we're going to use it." He merely gave us the cases. But you asked-- my question was, the first time I heard [p. 249] it.

Q. Yeah, right.

A. Was the-- was in-- his presentation to the committee.

Q. And these committee decisions that he gave you, did any of them talk about a 30-day rule that would cause somebody to lose their seniority rights on a seniority board?

A. No, sir.

Q. What did you think the cases meant?

A. I was really dumfounded why he was putting them in there. I had read them at lunch the day before and looked at it. They had no relevance.

They were talking about people being transferred, intercompany; like if I was working at Auto Convoy going from Dallas to Houston to Albuquerque. It had nothing to do with putting two companies together on what we call 54-C.

Q. I'm sorry. Did Mr. Neal at any point at Dana Point say, "Oh, well, Dave, it's because of the 30-day rule; that's what these cases are about?"

A. No.

Q. Did Mr. Neal ever tell you that there were other drivers back in this October '94 time frame who were off on work comp, who got to transfer, and no 30-day rule applied [p. 250] to them? Did Mr. Neal tell you about that?

A. No, sir.

Q. Did Mr. Neal ever tell you that there was never a 30-day rule posted anywhere at Allied or Cassens?

A. No, sir.

Q. And when you testified at Dana Point, was Mr. Neal still with you?

A. He was there at the table with me, yes, sir, side by side.

Q. Why was he there?

A. He's my representative; he's my union representative.

Q. And what's your understanding of his obligation as a union representative in a hearing?

A. He -- his first obligation is to research the case and get as much background in the case and as much history through prior decisions that he can, and to aid the grievant into preparing the case.

But more than that, he's there to present the case to the committee and bring out facts that can make the committee knowledgeable of facts in this particular, or any particular grievance.

Q. Do you believe it was reasonable to expect that he would know the contract and know the prior committee decisions better than you?

* * *

[p. 393]

right?

A. Well, that's not really the way it happened, Mr. Mercado, no.

Q. Okay. Didn't Mr. Neal tell the company to put you in the--on the seniority list, put you to work?

A. I'm referring to the question. You asked me a question back. You said: Didn't he take you to Smyrna and have a meeting. And that's not the way it happened. I'm sorry.

Q. I'm sorry, I know. You drove yourself over there and he drove over there; correct?

A. No, sir. He and Mr. Firkus had a meeting prior to our mutual meeting, and he had already left the terminal. And I called him on the cell phone, and he came back to the terminal.

Q. Okay, But do you know whether or not he was even meeting about your situation? There are other drivers there. He could have been talking about any other thing; right?

A. No, sir, I know it because he and both Mark Flett said that they talked to Mr. Firkus about my deal, about my situation.

Q. Okay. Now, you did, however, then go back and talk to them-- to the company about your situation with. Mr. Neal; correct?

[p. 394]

A. When I was at the motel, I found that Mr. Neal was already at the terminal having a meeting with Mr. Firkus, I went to the terminal, and Mr. Neal had already left.

I immediately called him on the cell phone, and he evidently-- just two or three blocks away-- returned to the

terminal. And that's when we had the meeting, my first meeting, with Mr. Firkus about this seniority problem.

Q. Okay. And isn't it true that he said that you should be put onto the company's seniority list?

A. Yes.

Q. And, of course-- and that was your position, too; correct?

A. Yes, sir.

Q. And, of course, the company's position was that you had never been on the seniority list; correct?

A Yes, sir.

Q. And Mr. Firkus then further said that he would have to contact Mr. Joe Clark, the company's director of labor relations, to determine the company's official position with respect to your claim; correct?

A. Yes, sir.

Q. Okay. Now, you had known Mr. Firkus from before; correct?

A. Yes, sir.

Q. When Allied and Cassens used to share a terminal back

* * *

[p. 474]

A. Okay. All right.

Q. And does this exhibit have Mr. Dickerson's name on it?

A. Let me review it a minute.

Q. Sure.

A. Yes, sir. He's listed in the spot where I would be, number 6.

Q. And if you follow Mr. Dickerson's line over, does it have a date on there that actually is your company seniority date?

A. Sure does.

Q. What date is that?

A. 9/25 of '80.

Q. And you are certain that's not Mr. Dickerson's?

A. I have served with Mr. Dickerson since when he joined, 10/10 of '80. And we've been on many bids, and we've served in many terminals. You always know the people around you because the terminal seniority is so important, who's picking first and who's choosing what first. No, I know Chuck's date.

Q. All right. If we look at Exhibit 7, first page–

A. Okay.

Q. -- January 10, 1995. Is Mr. Dickerson's name on this one?

A. It is.

[p. 475]

Q. And the seniority date, is it yours or his?

A. That's my seniority date. He's in my slot, number 6. You can look back to the other evidence in the defendant's book–

MR. MERCADO: Objection, Your Honor. There is no question pending.

THE COURT: Sustained. There is no question pending, Mr. Garrison.

THE WITNESS: I'm sorry.

By Mr. Moen:

Q. Turn back to our Exhibit 5, terminal seniority list, November 15, 1994. Mr. Dickerson's name is not yet on there; is it?

A. No, it isn't. No, sir.

Q. All right. One of the things that Mr. Mercado pointed out was that you had, for some period of time, worked for Allied during the time frame that we made a claim for damages for your -- for your fringe benefits and insurance and retirement; correct?

A. Yes, sir.

Q. And did you inadvertently include some months for which Allied did provide payment in our damages calculation?

A. Yes. The way he asked the question, he asked for other trucking. And when he said "other trucking," I assumed he was not talking about car-haul, so I didn't–

* * *

[p. 492]

Q. Right. This is Exhibit A. I think you have another version of it in purple there from Cassens. Are you familiar with this National Master Automobile Transporters Agreement; correct?

A Yes, I am.

Q. For the '95 to '99 time frame?

A. Yes, I am.

Q. Is there anything in this document anywhere that states that there's a 30-day rule requiring a driver to show up for work or have his name taken off the seniority board?

A. Not to my knowledge.

Q. Do you know of any National Committee decisions prior to Dave Garrison's case that ever ruled that a man lost his terminal seniority rights if he failed to show up within 30 days?

A. I never saw any until that day.

Q. And during this time frame that you were– well, were you at Smyrna, Tennessee in '94, or did you come there in '95?

A. Came there in '95.

Q. All right. During the entire time frame that you have been with Local 327, have you had occasion to go to the Smyrna, Tennessee, terminal?
A. Yes, sir.

Q. Have you ever seen posted anywhere any 30-day rule, [p. 493] requiring a driver to show up for work or lose his seniority rights?

A. No, sir.

Q. Are you aware of any driver that was ever notified that he must show up within 30 days or lose his terminal seniority rights?

A. Since that point?

Q. Prior to Dave Garrison's case.

A. No, sir.

Q. Do you know of any driver other than Dave Garrison prior to November of 1996 who ever lost his terminal seniority rights because he failed to show up for work within 30 days?

A. I didn't keep up with that prior to 1996 because I wasn't an agent, but I didn't know of any, no, sir.

Q. Okay. After the Dana Point hearing, you got a copy of that decision; correct?

A. Yes, sir.

Q. Did you think it was fair?

A. I didn't understand it, no, sir.

Q. Did you think it was unfair?

A. Yeah, I did, but a lot of decisions that I hear and get, some are fair and some are unfair, and I just take them as they come.

Q. Why did you think this one was unfair?

* * *

APPENDIX H

DANA POINT DECISION
(Garrison v .Cassens Transport Co.)

NATIONAL AUTOMOBILE TRANSPORTERS JOINT ARBITRATION C0MMITTEE
(NATJAC)

NATIONAL JOINT STANDING SENIORITY COMMITTEE[1]
(NJSSC)

Held: Tuesday, Wednesday, and Thursday
November 5, 6, and 7, 1996
Laguna Cliffs Marriott Resort Hotel
Dana Point, CA 92629

NJSSC No. 11-96-(9-96)-38

David L. Garrison,
Member of Teamsters Local No. 327 and
Local Union No. 327 (Nashville, TN)
v.
Cassens Transport Co.

[1] The bolding of type did not appear in the original document, but is provided to direct the attention of the reader to the fact that these persons participated in both, the Avon Lake Decision of 1992 & the Dana Point Decision of 1996.

NJSSC HEARING PANEL[2]

Employer Co-Chairperson	Union Co-Chairperson
R. Ian Hunter[3]	**James D. Jackson**[4]

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[2] The bolding of type did not appear in the original document, but is provided to direct the attention of the reader to the significant items and that these people were the authors and/or participants of the Avon Lake Decision written in 1992, four (4) years prior to this decision.

By keeping silent and not invoking the **standard established** by the Avon Lake Decision of 1992, Local 327 did violate the" minimum levels of integrity" **standard established** by ***Hines v. Anchor,*** 424 U.S. 554, (1976).

[3] **R. Ian Hunter**, was the Employers Co-Chairperson, of both the Avon Lake Decision of 1992, and this Dana Point Decision of 1996.

[4] **J. D Jackson**, was Secretary-Treasurer of Teamsters Local Union No. 299 in 1992. The E & L worker who was on workers' compensation, due to an on-the-job injury, was a member of Local No. 299, referred to in Avon Lake Decision of 1992.

Employer Panel Members	Union Panel Members
Ron Borges[5]	**Charles Lee**[6]
William Hadley[7]	Timothy Lehman
Tony LaBue	Fred Zuckerman

Based on the facts presented, the Committee finds as follows:

1. Mr. Garrison made timely request to Cassens for employment consistent with this Committee's prior decision (Case No. 10-94-80 I-A) and this request was acknowledged by Cassens' terminal manager.

2. However, Mr. Garrison was not actively working at the time the work in question was transferred from Allied to Cassens, due to an on-the-job-injury suffered in 1990

3. As a result of this injury, Mr. Garrison did not make himself available for work until June 1996.

4. Prior decisions of this Committee require that employees who follow their work under these circumstances make

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[5] **Ron Borges,** was a Panel Member of both the Avon Lake Decision of 1992, and this Dana Point Decision of 1996.

[6] **Charles Lee,** BA for Teamsters Local Union No. 299 in 1992, appeared on behalf of Teamsters Local No. 299., and represented the interest of the E & L Woodhaven Drivers' during the Avon Lake Decision of 1992.

[7] **William Hadley,** was a Panel Member of both the Avon Lake Decision of 1992, and this Dana Point Decision of 1996.

themselves available for work within thirty days after expressing their desire to do so.[8]

5. Because Mr. Garrison failed to make himself available to work for Cassens within thirty days after expressing his desire to work for Cassens in November of 1994, his rights to transfer were extinguished.

6. Mr. Garrison retains his seniority with Allied as a laid off employee and enjoys additional help rights opportunities that may arise with this company.

Signed:

R. Ian Hunter,	Employer	Co-Chairperson
James D. Jackson,	Union	Co-Chairperson

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[8] Not True...The prior Avon Lake Decision of 1992, authored by many of these same Committee Panel Members, who are the very people that **established the standard** and instructed Companies as what to do, when an employee is off work due to an on-the-job injury, and when under Article 5, Section 5, (a), of the National Contract, (NMATA), the employee elects to "Follow The Work" to the surviving company.

APPENDIX I

Transcript Excerpt

July 12, 2001

District Court ruling on Defendant's Rule 50 Motion

[p. 808]

investigate, itself, does not rise to the level of a breach of the duty of fair representation for purposes of the arbitrary prong.

And that's Hines vs. Local Union Number 377. Negligence, again, and poor judgment is not enough. They made a judgment in Dana Point to go forward.

Now, had Mr. Neal just ignored those cases and -- that would have been a different situation, but the evidence is that he read those cases, and he made a judgment that they weren't applicable; same thing as Mr. Garrison, both of them knowing that they could have postponed the case.

And, like I said, failure to investigate is not in and of itself a basis of breach of the duty of fair representation. So given that, how does that taint the decision?

THE COURT: Can I run a copy of -- just of the front of this and give it back to you? I promise I won't read the back.

MR. MERCADO: I have a clean one.

THE COURT: Do you have a clean copy?

MR. MERCADO: Yeah, I have got a clean one.

THE COURT: Okay. Be back shortly. We are in recess.

(Break at 4:10 p.m. Reassembled at 4:45 p.m.)

THE COURT: On the defense motion for judgment [p.809] as a matter of law, which has been renewed, the standard on such a motion under Rule 50, no matter when it's made, is that there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.

The Sixth Circuit standard requires that the -- that the evidence be viewed in the light of those inferences most favorable to the nonmovant; here, the plaintiff.

And I must find that there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable persons could differ.

"The court should neither weigh the evidence, evaluate the credibility of the witnesses, nor substitute its judgment for that of the jury. It is only when it is clear that reasonable people could come to but one conclusion that this motion should be granted regardless of whether the trial judge might have reached a different conclusion were he or she the trier of fact."

And the Supreme Court in a 2000 decision, Reeves v. Sanderson Plumbing, says that the standard for judgment as a matter of law mirrors the standard for summary judgment under 56. All reasonable inferences are to be drawn in favor

of the nonmoving party, making no credibility determinations or weighing any evidence."

In examining the hearing transcript in California, it seems to me that a reasonable jury could have found that -- [p. 810] and this makes a lot more sense to me, having thought through it, than my initial feeling that they had to have found -- and I guess I coupled this with -- I was influenced by their punitive damages finding.

I thought that they had to have found the bad faith prong on the duty of fair representation. But the more I consider this and the more I look at the hearing transcript, the more I feel that a reasonable jury -- and also in the time frame that they did it, in an hour and a half, they could have gone back and read that transcript of the California hearing and found that the prong that they were going to go on here was the arbitrary prong; that the union acted arbitrarily when its action taken on behalf of an employee or its failure to take action on behalf of an employee in light of the circumstances is so far outside a wide range of reasonableness as to be irrational.

This is how I feel the jury could have seen the evidence. The presentation at the grievance hearing -- the company's presentation is made by Joe Clark, who is one of them, who sits on these committees. He probably knows everybody on the committee, and there is evidence in the record to the effect that Mr. Clark sits on all these committees.

So he -- the jury reasonably could conclude Mr. Clark had lots of credibility with these folks. Mr. Clark comes [p.811]

in and talks about all these 30-day decisions, presents them to the committee.

Mr. Neal, who is the representative of this worker, Mr. Garrison, says nothing in rebuttal about those cases. The only person who discusses them at all is Mr. Garrison who's a total novice, who's just gotten them two days ago, and has virtually no credibility with the committee, certainly not an edge like Mr. Clark has.

I'm talking about reasonable inferences that a jury can draw from the evidence in the record. The only rebuttal on those cases is from Mr. Garrison. Mr. Neal is mute on those cases; he says nothing.

And the suggestion I think they are entitled -- they would have been entirely reasonable to reject the suggestion of the defense that somehow the dashes that appear in the transcript indicate that maybe the transcript is inaccurate. There are dashes throughout this transcript.

They are obviously indications when someone is pausing, and I think it's very reasonable for them to conclude this is the entire thing that Mr. Neal said.

So not only does Mr. Neal, who also would have much more credibility with the committee than Mr. Garrison, says nothing to rebut these cases, but also the only argument about the contract which Mr. Neal helped negotiate, and the fact that seniority can only be terminated in these three [p. 812] ways, that legal argument that the managing agent, the union representative, should have known a whole lot more about than this man all by himself, this worker, the only legal argument on the contract is made by Mr. Garrison.

And Mr. Neal doesn't even shore it up. He doesn't even say, "Absolutely right, seniority can only be terminated these three ways; these cases are junk, they do not apply here." He leaves this man hanging out there to make legal arguments on these decisions and on the contract.

And it seems to me that despite the fact that Mr. Garrison did not request a continuance of the hearing so that he could get more materials together, I think the jury could have inferred that Mr. Neal breached the duty of fair representation in an incredible way because he didn't help this man at all at this hearing.

There didn't need to be a continuance. Mr. Neal could have represented him at the hearing. He didn't do anything at the hearing. If you read the transcript, Mr. Neal did nothing.

And the fact that the company's case was presented by Mr. Clark, who has lots of credibility, lots of experience with these people, and the only arguments on the merits, really, that were made at the hearing were made by Mr. Garrison, who has no credibility, no history with these people, and the person who would have that credibility and [p. 813] history with these people is Mr. Neal, and he stands by mute, that says to the committee, "Look, I don't care what happens to this guy," or "He's wrong and I don't want to make him look bad," or who knows what it says to the committee, but it seems to me that it is entirely reasonable for this jury to infer that this is within the -- so far outside a wide range of reasonableness as to be irrational.

So I think that whether or not they bought all the suggestions of collusion and ill motives on the part of Neal and Mr. Neal wanting to protect the union and all that, whether they bought any of that -- and that may, in fact, be

conjecture, as Mr. -- I just have a mental block today, I'm sorry –

MR. MERCADO: Mercado.

THE COURT: -- Mercado wants to state that may well be conjecture, but I think it is not conjecture, and it is within reason for the jury to have inferred from the evidence in this record arbitrary conduct, and that that very conduct which was so arbitrary as to be irrational affected the outcome.

That if Mr. Neal had made these arguments and rebutted those cases and talked about the contract and the ways in which you breached seniority, if Mr. Neal had made those arguments, that it might well have changed the outcome of the grievance proceeding.

[p. 814]

So for all those reasons -- and with regard to the punitive damages, first of all, they are not out of proportion to the back wages that have been awarded. They're not out of proportion.

And it seems to me that if there's anything that is a jury question, it is whether the conduct of the company in this case was outrageous or egregious.

And there is plenty of evidence in the record from which this jury could and did find that their conduct with regard to Mr. Garrison was outrageous and egregious.

There was evidence that Mr. Firkus originally stated that his signature was a forgery; they could have believed that testimony.

And that then when confronted, with it, "Oh, I don't remember"; the business of Mr. Garrison's company date or terminal date being on one of those lists opposite the name of Mr. Dickerson, that it didn't coincide with; the -- the not raising the 30-day rule at the prehearing, raising it when Mr. Garrison wasn't present; only providing him with these decisions two days before, when the contract says that when you are going to rely on decisions, you get them to them as soon as possible, it seems to me there is enough evidence in this record that the jury could have reasonably found that the company's conduct was outrageous or egregious.

[p. 815]

So I am going to deny the motion and leave the jury's verdict as it is.

The other outstanding issues, I guess, are attorney's fees. Is there anything else outstanding?

MR. MOEN: Reinstatement, Your Honor.

THE COURT: Reinstatement. I am not going to find joint and several liability. I do not find enough evidence of collusive conduct between the union and the company. I'm not going to make joint and several liability.

And the attorney's fees can only be awarded if the common benefit exception applies or the bad faith exception, and I guess I'll let you both argue those points on attorney's fees. You want to argue that now?

MR. MOEN: Yes, Your Honor. I think on the common benefit doctrine, if I understand that correctly, now that would

probably not be applicable. It seems to me to be in the nature of a class action type of scenario, which we do not have.

We could argue that through the efforts of Mr. Garrison, the 30-day rule has been substantially stricken or weakened in the eyes of the company such that it may not be enforced, but I'm not sure that fits into that exception.

The bad faith exception may be more appropriate, and that would be a question for you to determine based on the evidence that you have heard, whether the defendant acted in

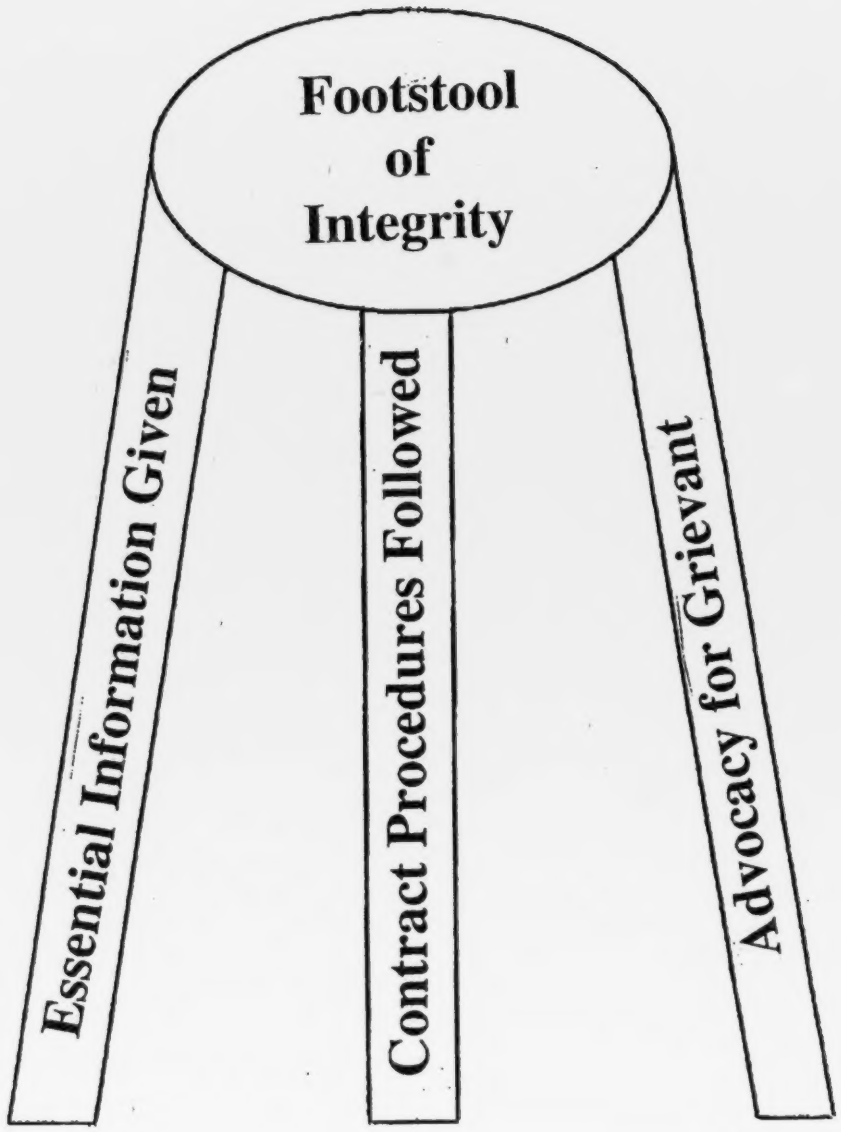
***

APPENDIX J

See Fold Out Exhibit

Footstool Diagram

Fair and Honest Grievance Hearing



A Fair and Honest Hearing

The
Footstool
of
Integrity

"The Minimum Standards"

1. Essential Information Given
2. Contract Procedures Followed
3. Advocacy for the Grievant

Essential Information Given

1) The Union shall provide to the Employee, prior to the first meeting with the Company, all charges that the Company is bringing against the Employee.

2) The Union shall provide in writing the identity of every Article and Section of the Collective Bargaining Agreement that are relevant to the charges brought against the Employee.

3) The Union shall provide to the Employee, prior to the first meeting with the Company, all relevant prior Committee decisions concerning the subject matter contained within the grievance.

4) The Union shall provide to the Employee the Union's Internet Website, if available, along with:

a) A complete copy of the Collective Bargaining Agreement, with a search engine;

b) Complete listing of all prior Committee decisions, with a search engine.

Contract Procedures Followed

1) The Union shall provide to the Employee, a complete set of the rules of procedure for each grievance level or each Arbitration Committee level grievance.

2) The Union shall require that all procedures which govern grievances which are listed in the Contract are followed.

3) The Union shall utilize the grievance procedures available in the Contract to obtain all information that could reasonably assist the grievant.

Advocacy for the Grievant

1) Prior to the first meeting with the Company, the Union representative for the Employee will meet with the Employee and discuss strategy and information available to the Union with respect to the grievance.

2) The Union representative shall make reasonable efforts to follow up on information in its possession or information from the grievant to substantiate the grievant's case so that the Union may be prepared for the hearing.

3) The Union representative shall, in all cases, put forth an argument on behalf of the Employee at any

grievance hearing, and shall make a good faith effort to put forth the best argument available based upon the facts and applicable prior Committee decisions.

4) On or before the first meeting with the Company, the Union representative shall meet with the Employee to make the Employee aware of the argument that the Union representative will be making on his or her behalf at the grievance.

APPENDIX K

NATIONAL NEGOTIATING COMMITTEE MEMBERS of the NATIONAL MASTER AUTOMOBILE TRANSPORTERS AGREEMENT and the CENTRAL and SOUTHERN AREA SUPPLEMENTAL AGREEMENT

NATIONAL MASTERS AUTOMOBILE TRANSPORTERS AGREEMENT

NEGOTIATING COMMITTEE[1]
FOR THE LOCAL UNIONS:

Teamsters National Automobile Transporters Industry Negotiating Committee

Ron Carey, Chairperson
Rondal Owens, Co-Chairperson

Bennie Goodwin
Ronnie Greene
Paul Houck
J. D. Jackson[4]
Charles Lee[2]
Tim Lehman[3]
Ken Mee
Jim Roberts

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[1] The bolding of type did not appear in the original document, but is provided to direct the attention of the reader to the fact that these persons participated in both, the Avon Lake Decision of 1992 & the Dana Point Decision of 1996, having prior knowledge of the Avon Lake Decision of 1992.

[2] **Charles Lee,** was a Panel Member on the Dana Point Decision of 1996. **Charles Lee,** represented the E & L worker off on worker's compensation in the Avon Lake Decision of 1992.

[3] **Tim Lehman,** Panel Member on Dana Point Decision of 1996.

[4] **J. D Jackson**, was Secretary-Treasurer of Teamsters Local Union No. 299 in 1992, The E & L worker who was on workers' compensation, due to an on-the-job injury, was a member of Local No. 299, referred to in Avon Lake Decision of 1992.
J. D. Jackson, was also Co-Chairperson, on Dana Point Decision of 1996.

NATIONAL MASTERS AUTOMOBILE TRANSPORTERS AGREEMENT

NEGOTIATING COMMITTEE[5]
FOR THE EMPLOYERS:

National Automobile Transporters
Labor Division (NATLD)

R. Ian Hunter, Chairperson[6]

Ron Borges[7] A.J. Kosak

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[5] The bolding of type does not appear in the original document, but is provided to direct the attention of the reader to persons who participated in the Dana Point Decision of 1996, having prior knowledge of the Avon Lake Decision of 1992.

[6] **R. Ian Hunter,** was the Employers Co-Chairperson in both the Avon Lake Decision of 1992 and the Dana Point Decision of 1996.

[7] **Ron Borges,** was a Panel Member in both the Dana Point Decision of 1996, and the Avon Lake Decision of 1992.

Allen Cassens[8]	**Anthony LaBue**[9]
William P. Hadley[10]	Jack Nelson
Charles Johnson	Dan Sandy, Jr.

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[8] **Allen Cassens,** of Cassens Transport Co., by and through his Labor Relations Representative, Mr. Jim Walker, asked for clarification as to how long the Company (Cassens) was obligated to afford work at the Avon Lake facility to the E & L worker who was on workers' compensation, due to an on-the-job injury, referred to in Avon Lake Decision of 1992:

> "With regards to the E & L employee on workers' compensation who has elected to transfer to Cassens, **he is to be deemed as transferred** and **will hold seniority at Avon Lake** and will be permitted to assume an active position upon his release from compensation status."

[9] **Anthony LaBue,** was a Panel Member in both the Dana Point Decision of 1996, and the Avon Lake Decision of 1992.

[10] **William Hadley,** was a Panel Member in both the Dana Point Decision of 1996, and the Avon Lake Decision of 1992.

CENTRAL and SOUTHERN AREA SUPPLEMENTAL AGREEMENT

NEGOTIATING COMMITTEE[11] FOR THE UNIONS:

Charles Lee, Co-Chairperson[12]
Robert Cummins, Co-Chairperson

Roy Atha
Rocky Blevins
Gary Coker
Bob Eliser
George Foster
Mark Frey
Benny Goodwin
Ronnie Greene
J.D. Jackson[14,15]
Walter Lytle
Howard Molpus
Jimmy Neal[13]
Kenneth Nelligan
James Ramirez
George Saunders
Edward Sherman
Harold Simmons
Michael Sweeney

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[11] The bolding of type does not appear in the original document, but is provided to direct the attention of the reader to persons who participated in the Dana Point Decision of 1996, having prior knowledge of the Avon Lake Decision of 1992.

[12] **Charles Lee,** Panel Member on Dana Point Decision of 1996.

[13] **Jimmy Neal,** President and Business Agent of Teamsters Local Union No. 327, did not provide any assistance to Garrison in the preparation of Garrison's defense before the Dana Point Committee Hearing of 1996.

[14] **J. D Jackson**, was Secretary-Treasurer of Teamsters Local Union No. 299 in 1992. The E & L worker who was on workers' compensation, due to an on-the-job injury, was a member of Local No. 299, referred to in Avon Lake Decision of 1992.

[15] **J. D Jackson**, was also the Co-Chairperson of Dana Point Decision of 1996.

Robert Jaggers
Johnny Johnson
Tyson Johnson
John Thyer
Earl Walker
Fred Zuckerman[16]

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[16] **Fred Zuckerman,** Panel Member on Dana Point Decision of 1996.

CENTRAL and SOUTHERN AREA SUPPLEMENTAL AGREEMENT

NEGOTIATING COMMITTEE[17] FOR THE EMPLOYERS:

James D. Osmer, Chairperson

Perchie Adkins
Todd Barnum
Robert Bertrand
Gordon Birdsall
Ronald Borges[18]
William Carlisle
Joe Clark[19]
Ron O'Reilly
Kevin Pitts
Ronald Risher
Daniel Sandy, Jr.
Daniel Sandy, Sr.
Ed Sherrick
Eugene Sobie

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[17] The bolding of type does not appear in the original document, but is provided to direct the attention of the reader to persons who participated in the Dana Point Decision of 1996, having prior knowledge of the Avon Lake Decision of 1992.

[18] **Ronald Borges,** Panel Member on the Avon Lake Decision of 1992, and Panel Member on the Dana Point Decision of 1996.

[19] **Joe Clark,** Labor Representative for Cassens Transport Co. during 1996, having first hand knowledge of the Avon Lake Decision of 1992, by his silence lied to Garrison at the first Local Hearing conducted in July of 1996. **Joe Clark** was also the respondent for Cassens Transport Co. during the Dana Point Committee Hearing in 1996, and by his silence testified falsely before the Dana Point Committee of 1996.

Arland Corder
Curtis Goodwin

James Walker[20]
Jack Watkins

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[20] **James Walker,** Labor Representative for Cassens Transport Co. during the Avon Lake Committee Hearing of 1992, Walker asked the Avon Lake Committee for clarification as to how long the Company (Cassens) was obligated to afford work at the Avon Lake facility to an E & L Lorain driver who was presently on a leave of absence due to an on-the-job injury.

APPENDIX L

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:98-0415
VOLUME IV

DAVID L. GARRISON,)
Plaintiff,)
)
v.)
)
LOCAL 327 TEAMSTERS UNION)
and CASSENS TRANSPORT)
COMPANY,)
Defendants.)
)

TRANSCRIPT OF PROCEEDINGS

DATE: JULY 12, 2001

TIME: 9:00 A.M.

BEFORE: THE HONORABLE ALETA A. TRAUGER

COURT REPORTER:
BEVERLY "BECKY" COLE, RPR CCR
OFFICIAL COURT REPORTER
U.S. COURTHOUSE, A-837
801 BROADWAY
NASHVILLE, TN 37203
(615) 726-4955

[p. 742]

contrary to the terms of the collective bargaining agreement, he may file a grievance with the union.

The union, as the employee's exclusive bargaining agent, has the duty to file, investigate, and process that grievance.

The union has a wide range of reasonableness and discretion in determining whether and how far to process a grievance.

To show that the union breached its duty of fair representation, the employee must prove that the union's actions or inactions constituted more than mere negligence or poor judgment.

The union breaches its duty of fair representation when its decisions relating to an employee's grievance are arbitrary, discriminatory, or made in bad faith.

Arbitrary conduct is action taken without reason or judgment or the refusal to take action without reason or judgment.

A union acts arbitrarily when its actions taken on behalf of an employee or its failure to take action on behalf of an

employee in light of the circumstances is so far outside a wide range of reasonableness as to be irrational.

Examples of arbitrary conduct include things like: one, failing to act on an individual employee's complaint, [p. 743] despite having the past practice of always vigorously pursuing that particular complaint on behalf of other employees;

Two, agreeing to drop one employee's complaint if the employer agrees to what another employee wants;

Or, three, refusing to enforce a right on behalf of an employee, a right that the employee has because of a clear, unambiguous provision of the collective bargaining agreement, or a provision that through past practice the union and the employer mutually understand provides the employee with that right.

Those are merely examples.

To discriminate means to treat unequally. A union has the duty to protect equally all those employees that it represents,

That is, a union must treat similarly situated employees in the same way. A union, may not discriminate on the basis of some characteristic over which the employee has no control, such as race or gender, nor may a union discriminate on the basis of any factor not relevant to wages or working conditions.

A union exhibits bad faith when it acts or fails to act out of hostility, ill will, or political opposition toward a particular employee it represents. Bad faith implies the conscious doing of a wrong.

[p. 746]

the fault of each.

The employer is responsible for damages caused solely by its breach of a contract. The union is responsible for any increase in damages resulting from the violation of its duty of fair representation.

The plaintiff also claims that he is entitled to punitive damages, which are sometimes awarded in order to punish a defendant for some extraordinary misconduct and to serve as an example, or warning, to others not to engage in such conduct.

You may only award punitive damages against the defendant Cassens Transport Company in this case if you find that its conduct was outrageous or egregious. Cassens' simple breach of the collective bargaining agreement does not warrant an award of punitive damages.

I've given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts.

That I have instructed you on various subjects in this case, including that of damages, must not be taken as indicating an opinion of the Court on what you should find the facts to be or on which party is entitled to your verdict.

The attitude and conduct of jurors at the beginning

* * *

APPENDIX M

CHRONOLOGICAL LISTING Of DFR in GARRISON v. CASSENS

Breach of **DFR** No. 1.

In November, 1994, Defendant Cassens took over the work from Allied Systems at the Smyrna, Tennessee terminal. At that time Garrison was working for Allied. Garrison was notified that he needed to make his election to "follow the work" to Cassens if he chose to do so. Plaintiff was living in Missouri at that time and off on workers' compensation, recovering from an injury. Garrison contacted Allied with his election to "follow the work" to Cassens. It is undisputed that Garrison also sent a certified letter to the business agent for Local 327: "Would you please follow-up and make sure my name is placed on the seniority roster at Cassens in Smyrna Tennessee, in the order that my terminal seniority affords me?" (R. 236, Exhibit 3 of Defendant's Exhibit Q, Appendix 835). Nonetheless, Garrison's name was not on Cassens'

seniority roster and the Union never followed up on Garrison's request in writing to assure that his name got on Cassens' list. In November, 1994, Local 327 breached DFR by failing to assure Garrison's name was placed on Cassens' seniority list as requested, by Garrison and as required by prior decisions of the National Seniority Committee. (R. 236, Defendant's Exhibit B, Appendix p. 705).

Breach of **DFR** No. 2.

It is undisputed that in January,1995, Jimmy Neal, on behalf of Local 327, testified falsely to the National Committee that all of the drivers had been placed on the Cassens' seniority list. The list was not complete; Garrison's name was missing. (For citations see Garrison Brief, p. 8). The Union was liable because the Union failed to assure that Garrison's name was on the seniority list in November of 1994. This failure caused the loss of Garrison's seniority. (Garrison Brief, p. 36).

Breach of **DFR** No. 3.

In June of 1996, Garrison recovered from his injury and called Cassens' assistant terminal manager, John Grim, and told him that he was ready to go to work. Cassens' assistant terminal manager told Garrison his name was not on the list. Garrison then drove from Missouri to the office of Local Union 327 in Nashville, Tennessee and met with business agent Neal and principal officer, Hodkins. Hodkins stated, he did not know how the Union had missed putting Garrison's name on the list. Hodkins stated "We need to meet with Firkus." Neal arranged a meeting for the next day between Garrison, Cassens' terminal manager, Firkus, and himself. However, it is undisputed that the next day, June 11, 1996, Neal left Garrison at his motel room and met secretly with Firkus at the terminal. (Garrison Brief, p. 9). Neal acted in

bad faith by meeting secretly with Firkus regarding the Union's failure to put Garrison's name on the list, and thereby breached the Union's duty to represent Garrison.

Breach of **DFR** No. 4.

After Neal's secret meeting with Cassens' terminal manager, Cassens continued to refuse to employ Garrison. Garrison filed a Grievance.

At the local grievance hearing in July, 1996, Joe Clark, on behalf of Cassens, took the position that Garrison had never notified them that he wanted to follow the work and that he did not have a valid medical release. At this hearing neither Clark nor any other person mentioned any alleged 30-day rule precluding Garrison's employment. (Garrison Brief, p. 11; R. 280, Tr. p. 240, Appendix 1218). Neal, as business agent for the Union, acted as if he was supportive of Garrison's position and told him that he should win. However, Garrison lost his grievance at the local level hearing. (R. 263, Appendix p. 213-214). The Union failed to fairly represent Garrison because it refused to take responsibility at the local level grievance hearing for its failure to assure that Garrison's name was on the Cassens' seniority list. Because of this, the Union had liability for bad faith as plead in Garrison's Complaint filed in this lawsuit. (See R. 213, Appendix pp. 71-73).

Breach of **DFR** No. 5.

The next level of the grievance process involved a hearing in New Orleans, Neal told Garrison not to bother to attend this hearing. Neal told Garrison he would handle this hearing on his own. (R. 264, Appendix p. 214). Garrison put his trust in Neal. In August of 1996, in Garrison's absence, Neal met with Clark at the New Orleans Central Southern Committee

hearing. Clark advanced for the first time Cassens' alleged 30-day rule. Clark also discussed prior Committee decisions that he falsely claimed established this rule. (Garrison Brief, p. 12) The National Agreement (hereinafter "NMATA"), part of which Neal was involved in negotiating, requires that Clark provide to Neal Committee decisions he is relying on as soon as possible before the grievance hearing:

> Any party to a grievance who intends to use a decision of any joint arbitration committee as precedent **must** present a copy of the decision to the other party **as soon as possible** prior to final presentation of the case to the committee. (Emphasis added). (R. 236, Defendant's Exhibit A, Article 7, B4, Step 4, page 39)

Neal knew about the decisions Clark was relying on, but he did not request that Clark provide him with the decisions. (Garrison Brief, p. 12). Neal breached his duty to represent Garrison by failing to obtain these Committee decisions at New Orleans. Neal's secret meetings with Cassens' management, and the invention of the 30-day rule is strong evidence of collusion. The 30-day rule offered the opportunity for both Cassens and the Union to escape liability for Garrison's loss of seniority. If Cassens could enforce a 30-day rule which required that Garrison show up and be fit for work in 1994, then the Union's failure to assure that Garrison's name was on the list would be obfuscated. The facts support the inference that Local 327 and Cassens **colluded** to destroy Garrison's seniority rights.

Breach of **DFR** No. 6.

There is no dispute that Neal failed to tell Garrison about this new 30-day rule that Clark advanced at the New Orleans hearing. Neal spoke with Garrison every day after the

hearing. (Garrison Brief, pp. 12, 13). Neal told Garrison he lost, but he didn't tell him why. Garrison then set about avidly preparing for his last grievance hearing which was to be held at the National Joint Standing Seniority Committee (hereinafter "NJSSC") in Dana Point, California in November, 1996. (Garrison Brief, pp. 12-13; R. 264, Appendix 214). Neal betrayed Garrison by failing to tell Garrison of the 30-day rule after the New Orleans hearing. Neal led Garrison to believe that he was representing him and that he wanted to help him.(Garrison Brief, pp. 34, 35) The jury was certainly free to conclude that Neal intentionally withheld information from Garrison about the 30-day rule because that was the most effective way to protect the Union from liability for its failure to assure that Garrison's name was on the seniority list.

Breach of **DFR** No. 7.

It was undisputed that Neal was a trained professional and sat on the negotiating committee for NMATA. Neal had to know he was required to request copies of committee decisions advanced by Clark:

Grievant's Bill of Rights

> All employees who file grievances under the agreement and its supplemental agreements are entitled to have their cases decided fairly and promptly. In order to satisfy these objectives and promote confidence in the integrity of the grievance process, all employees who file grievances are entitled to the following rights:...
>
> 3. The employer shall provide any pertinent and relevant information identified with reasonable

> specificity within fifteen (15) days of receipt of a written request by the local union, steward or grievant. (R. 236, Defendant's Exhibit A, Article 7, B18, p. 49).

Neal returned to Nashville from New Orleans and failed to make a written request for the Committee decisions he knew Clark was going to use in Garrison's next grievance hearing. Neal thereby violated, the "Grievant's Bill of Rights" guaranteed under NMATA. Neal again betrayed Garrison. Neal's failure to protect Garrison's rights under the "Grievant's Bill of Rights" standing alone constitutes a breach of the duty to fairly represent an employee under NMATA.

Breach of **DFR** No.8.

Between the time of the New Orleans hearing in August of 1996, and the date of the Dana Point hearing in November of 1996,Garrison prepared what he believed was a thorough packet of information to submit at the Dana Point grievance to rebut Cassens' arguments that he never elected to follow the work and that he did not have a medical release. Garrison gave this information to Neal so that Neal could look through it and make any suggestions about things that needed to be included. Neal read it and said "It looks like you have it all summed up." (R. 260, Tr. 247, Appendix p. 1221). Neal again betrayed Garrison. In Garrison's written presentation to the Committee at Dana Point, there is no mention of any 30-day rule. (R. 281, Tr. p. 495, Appendix p. 1360) There is no dispute that Garrison was completely unprepared to rebut the 30-day rule at the Dana Point hearing. (R. 236, Defendant's Exhibit Y, Appendix p. 843). There is no dispute that this was a result of Neal's decision to violate Garrison's "Bill of Rights."

Breach of **DFR** No. 9.

On the Sunday before the Dana Point hearing, Joe Clark, on behalf of Cassens, gave Neal seven Committee decisions. Clark did not tell Garrison what the decisions stood for, nor did he mention the 30-day rule. Neal handed the Committee decisions to Garrison and said "What do you think?" Garrison tried to read and understand the Committee decisions given to Neal by Clark. To Garrison, none of the decisions said anything about his issues in the grievance. The seven decisions said nothing about why Garrison's name was not on a seniority list, or the technical requirements of a medical release. The decisions were silent about any rule that caused the loss of terminal seniority after the dovetailing of a seniority list. Garrison did not know what the cases meant. (r. 260, Tr. p. 248, 249, Appendix p. 1222, 1223). Garrison didn't understand how the Committee decisions were relevant to Cassens' argument that he had never made the election to follow the work and that he didn't have a medical release. Neal never told Garrison that these prior Committee decisions were intended to advance a new and false 30-day rule terminating his seniority. Neal decided once again not to tell Garrison that Clark had advanced these Committee decisions and a 30-day rule 4 months earlier at the New Orleans hearing. (Garrison Brief, p. 14; R. 280, Tr. p. 248-249; Appendix 1222 and 1223). Neal probably hoped his decision not to tell Garrison about Cassens' 30-day rule would cause Garrison to lose his grievance hearing. The poisonous tree bore fruit. Garrison lost the grievance (due to Neal's unfair representation) and the Committee decision placed no blame on the Union or Cassens. (R. 264, Appendix p. 215)

Breach of **DFR** No. 10.

It is undisputed that Neal knew that Garrison was the only driver in the entire history of the car haul industry who ever faced the loss of his terminal seniority because of Cassens' invented 30-day rule. Neal knew NMATA prohibited Cassens' application of its fake 30-day rule. Neal knew there had never been a notice posted of Cassens' 30-day rule as required by the NMATA. (See citations in Garrison Brief, p. 5). Neal admitted at trial that he knew of no Committee decision that had ever applied the 30-day rule to eliminate terminal seniority rights. Clark admitted that there were other drivers who were not able to work within 30 days but did not have their names taken off the seniority list. (R. 260, Tr. pp. 520-521). This supports the inference by the jury that Clark, on behalf of Cassens, was lying and Neal knew it. Garrison proved that Cassens' 30-day rule was a fake. The Panel incorrectly states: "....The thirty-day rule was rarely invoked and even more rarely relied on as a basis to defeat a grievance." (Panel Decision p.17). This error by the Panel is of paramount importance. As the Panel recognizes, Clark submitted seven prior Committee decisions deeding with the contractual 30-day rule at the Dana Point Hearing. Obviously, the 30-day rule as described in the contract is not obscure. The Panel's decision indicates that the Panel understood that Cassens, through Clark, was advocating a false 30-day rule:

> "Although the Committee relied on the seven arbitral precedents submitted by Cassens in reaching its conclusion, **none** of the decisions specifically involved the dovetailing of seniority rights; instead all the cases involved in-company transfers to either new terminals, new jobs, or other terminals with new work opportunities." (Panel Decision, p. 10).

It is only reasonable to infer that Neal knew this also. At trial, Garrison proved that the fake 30-day rule was **never,** in the entire history of the car haul industry, used by any employer to destroy terminal seniority rights. (R. 240, Appendix pp. 122, 123). Cassens' 30-day rule was a lie, it was not an "obscure rule." The Panel's misunderstanding led it to believe that Neal's failure to tell Garrison about Cassens' planned application of the 30-day rule was negligence. However, it is likely that Neal was advancing Cassens' agenda by allowing a fake 30-day rule as an explanation for Garrison's loss of seniority. The jury should have found Neal guilty of intentional misconduct based upon these facts.

Breach of **DFR** No. 11.

The transcript from the grievance hearing in Dana Point, California was introduced into evidence at trial. It was very revealing. The transcript proves that Neal left Garrison entirely on his own to present his grievance. Most importantly, Neal left Garrison entirely on his own to argue against the applicability of Cassens' 30-day rule. Neal knew many of the Seniority Committee members at this hearing. It is undisputed that Neal would have had much more credibility with them than Garrison, whom the Seniority Committee had never seen before. Neal was mute on the 30-day rule. Neal did not even agree with Garrison when Garrison said he didn't think the Committee decisions seemed to apply to his situation. This spoke volumes to the Committee members. The jury should certainly have considered that Neal's muteness substantially affected the outcome of the hearing.

Breach of **DFR** No. 12.

During the Dana Point hearing, Clark, on behalf of Cassens, repeatedly blamed Local 327 for failing to get Garrison's

name on the list in January, 1995, when Neal testified the list was complete. Neal knew Clark was right. The Union was to blame but Neal would not admit it. Neal had a motive to remain silent on the 30-day rule. The invention of a 30 day rule destroying Garrison's terminal seniority allowed the Union to escape liability because Garrison was, in fact, physically unable in 1994 to present himself to work within 30 days. Cassens' 30-day rule exonerated both Cassens and Neal and placed all the blame on Garrison. The decision by the Seniority Committee meant that the Union had no liability for dropping the ball – failing to get Garrison's name on the seniority roster. (R. 264, Appendix p. 214-215). Neal stood silently by while the lamb he should have protected was led to the slaughter.

Breach of **DFR** No. 13.

Neal was knowledgeable with respect to the seniority rights and the collective bargaining agreement. He was one of the negotiators of the Central and Southern Area Supplemental Agreement to the NMATA. (Plaintiff's Exhibit 1, p. 293). Neal had access to prior Committee decisions. (R. 281 and 282, Tr. p. 492 and 616, Appendix p. 1357 and 1425). Neal knew the prior decisions of the Seniority Committee which were submitted by Clark were not relevant to Garrison's case. Neal never even attempted to obtain Committee decisions relevant to the issue in Garrison's grievance. The Avon Lake decision would have disposed of Garrison's case. In that decision, the Seniority Committee concluded that a driver off on workers' compensation status who elected to transfer to Cassens was deemed transferred and would hold his seniority at Avon Lake until released from compensation status. In other words, there is no 30-day rule. Cassens was a party to the Avon Lake decision, as were Ian Hunter, Ron Borges, and William Hadley. These persons were on the Seniority

Committee in Garrison's case and were on the Avon Lake Committee when the Avon Lake decision was made. (See citations in Garrison's Brief, p. 20). The Panel concedes that the Avon Lake case was dispositive. Had the Seniority Committee in Dana Point been reminded of the Avon Lake decision, the outcome should have been different. (Panel Decision, p. 10) Neal could easily have made a colorable argument that the Committee decisions relied on by Cassens were not applicable to Garrison's case. Neal could have found the Avon Lake decision, but Neal said nothing and did nothing. (R. 264, Appendix p. 215-216). Neal caved in and did not stand up for Garrison. Garrison argued to the jury, the trial court and this tribunal in his brief that Neal's silence at the hearing was most likely motivated by an illegitimate purpose. (Garrison Brief, pp. 37-38).

Breach of **DFR** No. 14.

As this Court recognizes, the NJSSC Committee did not distinguish relevant prior decisions from irrelevant ones. (Panel Decision p. 10). Garrison did not have a fair hearing and the process was fundamentally flawed. The grievance hearing at Dana Point was conducted without the benefit of a prepared grievant. Cassens was well prepared. Garrison thought he was too, but thanks to Neal he wasn't. Had Garrison or Neal been prepared to rebut the 30-day rule, the evidence suggests (and the jury could have determined) that the Committee would have ruled in Garrison's favor. The Union and Neal handled the grievance in a dishonest and perfunctory fashion, causing Garrison's loss of employment.

End of Appendix 5.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

Civil No. 3:98-0415
Judge Trauger

DAVID L. GARRISON, Plaintiff,

v.

CASSENS TRANSPORT CO., Defendant.

JURY VERDICT FORM

1. Do you find that Mr. Garrison has established by a preponderance of the evidence that Local Union 327 breached its duty of fair representation in handling Mr. Garrison's grievance against Cassens?

Yes ✓ No ____

If your answer to Question 1 is "No," do not answer any further questions. The foreperson should sign the Verdict Form and submit it.

2. Did the Union's breach of duty seriously flaw the grievance process such that it is more likely than not that the decision of the National Joint Standing Seniority Committee would have been different had the breach of duty not occurred?

Yes ✓ No ____

If your answer to Question 2 is "No," do not answer any further questions. The foreperson should sign the Verdict Form and submit it.

3. Do you find that Mr. Garrison has established by a preponderance of the evidence that Cassens Transport Co. breached Article 5, Section 3 and/or Article 5, Section 4(c) of the National Agreement by failing to employ Mr. Garrison in June of 1996 at the Smyrna, Tennessee terminal?

Yes ✓ No ____

If your answer to Question 3 is "No," do not answer any further questions. The foreperson should sign the Verdict From and submit it.

4. If your answers to Questions 1, 2 and 3 are "Yes," what is the total amount of back pay damages suffered by Mr. Garrison as a result of both the breach of contract and the unfair representation from June 1996 to the present.

$ 408,885

5. By what amount, if any, should Mr, Garrison's back pay damages be reduced for actual earnings and/or his failure to mitigate his damages?

$ None

6. What percentage of the Plaintiff's back pay damages, less his actual earnings and/or any failure to mitigate should be apportioned to the Company?

75%

7. What percentage of the Plaintiffs back pay damsges, less his actual earnings and/or any failure to mitigate, should be apportioned to Local 327?

25%

8. Has the plaintiff proved by a preponderance of the evidence that he is entitled punitive damages?

Yes ✓ No

If so, in what amoumt?

$ 500,000

/s/
JURY FOREPERSON

7-12-01
DATE

APPENDIX O

NATIONAL AUTOMOBILE TRANSPORTERS JOINT ARBITRATION COMMITTEE

25 LOUISIANA AVENUE, N.D.
WASHINGTON, D.C. 20001
Area Code (202) 624-6800

5TH Fl., 801 WEST BIG BEAVER
TROY, MI 48084
Area Code (313) 362-1300

REPORT OF THE MEETING HELD:
TUESDAY, WEDNESDAY AND THURSDAY
JANUARY 24, 25 AND 26, 1995 MEETINGS

TRADEWINDS ON ST. PETERSBURG BEACH
5500 GULF BOULEVARD
ST. PETERSBURG BEACH, FL 33706
AREA CODE: (813) 367-6461
FAX NO.: (813) 367-7496

1-95-(10-94)-801-a
CASSENS TRANSPORT COMPANY AND COMMERCIAL CARRIERS, INC. V. LOCAL UNION NO. 327 (NASHVILLE) AND ALLIED SYSTEMS, LTD.

RE: Determination of seniority rights per Article 5, Section 4(c); effective November 7, 1994, Nissan is cancelling Allied as its carrier at Smyrna, TN and tendering the traffic to Cassens Transport and Commercial Carriers, Inc.

HEARING PANEL

Employer Representatives	Union Representatives
ROBERT PARR,	RON OWENS,
Chairperson	Chairperson
Larry Ervin	Robert Cummins
Curtis Goodwin	James Doorhy
Dan Sandy, Jr.	Charles Lee

ISSUE(S): Did the Company place employees of Cassens and Allied holding common terminal seniority dates properly on the combined seniority list when dovetailing these employees when complying with this Committee's October 1994 decision in 10-94-801-A and, if not, how should they have been placed?

Background

Pursuant to this Committee's initial decision involving this matter rendered in October, 1994, Cassens was instructed to dovetail the Cassens and certain Allied employees by terminal seniority and thereafter place them on a common seniority list.

At this time, the Company and Local Union 327 asked for clarification to determine whether the Company properly

followed this Committee's directive when dovetailing nine (9) Cassens' employees and two (2) former Allied employees who have the same terminal seniority date. The Company placed the eleven employees on the combined seniority list by utilizing their Cassens and Allied Company seniority. As the result, the two former Allied employees were placed behind all nine (9) Cassens employees since each had greater Company seniority.

Decision

Based on the facts and explanation presented, Cassens Transport's use of Company seniority for employees having the same terminal seniority date was proper and, therefore, the seniority list shall remain unchanged.

APPENDIX P

Dana Point, CA
Committee Hearing Room
November 5, 1996

See Foldout Exhibit

National Joint Standing Seniority Committee (NJSSC)

The Dana Point, CA - Grievance Hearing Room, Tuesday, November 5, 1996

R. Ian Hunter	**J. D. Jackson**	**Kurt Kobeit**
CO-Chairperson	CO-Chairperson	
CO-Secretary NATLD Employer Side	Dir. of Carhaul TNATINC Union Side	CO-Secretary IBT Legal Representative

Union's Table

Local Union No. 299

Union Representative
Charles Lee

Local Union No. 312

Union Representative
Timothy Lehman

Local Union No. 89

Union Representative
Fred Zuckerman

Employer's Table

Commercial Carriers, Inc.

Ron Borges
VP - Labor Relations

E & L Transport Co.

Tony LaBue
President

Hadley Auto Transport Co.

William Hadley
President & GM

Grievance Table

Union Side		Employer Side	
Teamster Local No. 327		**Cassens Transport Co.**	
Jimmy Neal	David Garrison	**Joe Clark**	**Allen Cassens**
Business Agent	Grievant	Dir. - Labor Relations	Vice Chairman

David Garrison did not receive a **Fair and Honest** Hearing at Dana Point, CA.,
because the components of the **Footstool of Integrity** were not in place!

Of the 13 participants in the Dana Point Hearing Room in 1996,
9 persons (in **bold** & underline) were personally in attendance
or had a personal representative in attendance, at the Avon Lake Decision of 1992.

Supreme Court, U.S.
FILED
JAN 5 - 2004
OFFICE OF THE CLERK

(2)

No. 03-808

In The
Supreme Court of the United States

DAVID L. GARRISON,

Petitioner,

v.

CASSENS TRANSPORT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN W. BRYANT
Counsel of Record
ROBERT L. MERCADO
KENNETH W. ZATKOFF
DEAN & FULKERSON
801 W. Big Beaver Road,
Suite 500
Troy, MI 48084-4767
(248) 362-1300

Attorneys for Respondent

QUESTIONS PRESENTED

Where a union member alleges that his union breached its duty to fairly represent him in the grievance process by choosing an unsuccessful strategy for presenting his case, settled precedents of this Court, applied without conflict by the Courts of Appeal, hold that a breach of the duty of fair representation is established only where the union's conduct was arbitrary ("so far outside a wide range of reasonableness as to be irrational"), in bad faith (resulting from "fraud, deceitful action or dishonest conduct"), or discriminatory. *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

The questions presented are:

1. Should the Court abandon this standard in favor of a proposed three-factor, 13-subfactor test which no reported court decision has ever adopted or discussed?

2. Should the Court re-weigh the Court of Appeals' application of the settled law to the record below, which held that the union's representation was neither arbitrary, discriminatory nor in bad faith?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Respondent Cassens Transport Company is a wholly-owned subsidiary of Cassens Corp., an Illinois corporation. No publicly held corporation owns ten percent or more of that corporation's stock.

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OPINIONS AND ORDER BELOW

The decision of the Court of Appeals dated July 7, 2003, is reported at 334 F.3d 528 (CA 6 2003). (5a-30a) The order of the Court of Appeals denying rehearing is unreported but is referenced at 334 F.3d 528, *supra*. (1a-4a) The amended judgment of the District Court dated August 2, 2001, which is the subject of the decision of the Court of Appeals is unreported. (31a-33a)

STATEMENT OF THE CASE

The instant case is a "hybrid" action for breach of fair representation and breach of contract under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). The underlying claim concerns a labor arbitration decision rendered November 5, 1996, adverse to the Petitioner David Garrison ("Garrison") and in favor of Respondent Cassens Transport Company ("Cassens"). (14a-15a)

Cassens is a trucking company engaged in the delivery of new automobiles and light duty trucks from assembly plants and railheads to dealerships located primarily in the Midwest. Cassens has operated in Smyrna, Tennessee since June, 1983 serving the Nissan Assembly Plant located near the company's terminal. (6a)[1] Teamsters Local

[1] For the purposes of this Brief, Cassens adopts the facts as set forth by the Court of Appeals. (6a-16a) The Court of Appeals reversed the District Court and held that Cassens was entitled to judgment as a matter of law under Fed. R. Civ. P. 50(b) (17a-18a) The Court of Appeals in such circumstances viewed the evidence in the light most favorable to Garrison and gave him the benefit of all reasonable inferences. (18a) As Garrison does not contend in his petition that the Court of Appeals'

(Continued on following page)

327 is the exclusive bargaining representative of the company's Smyrna drivers. Cassens and Local 327 are signatory to a multi-employer collective bargaining agreement referred to as the National Master Automobile Transporters Agreement ("NMATA"). (7a)

In 1980, Garrison became employed with another automobile hauler, Allied Systems, Ltd. ("Allied"). In 1986, he transferred to Allied's Smyrna, Tennessee terminal where he was employed until November 21, 1990, when he sustained an on-the-job injury. (6a) While employed by Allied as a driver at the Symrna terminal, Garrison also was a member of Local 327 and was covered by NMATA. (7a) He remained on Allied's seniority list after his injury even though he was not working.

In September, 1994, Nissan awarded Cassens a portion of its Smyrna transport work which previously had been performed by Allied. Allied, Cassens, and Local 327 submitted a request to the National Joint Arbitration Committee (the "NJAC") for a determination of the seniority rights of Allied employees affected by the work transfer. The NJAC issued its decision, ruling that pursuant to NMATA, Allied drivers had the right to transfer to Cassens to follow the Nissan work. Regarding seniority rights, the NJAC stated that Allied's seniority list was to be

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evidentiary summary fails to construe the evidence in the manner most favorable to his position, Cassens will rely upon that summary in responding to the petition. In many instances, however, the evidentiary record is significantly more favorable to Cassens than the Court of Appeals' summary may suggest.

dovetailed[2] by terminal seniority with the Cassens and Smyrna Seniority List. (8a)

As required by the NJAC's decision, Allied was responsible for preparing separate lists of Allied drivers seeking to transfer to Cassens. Allied notified all Allied employees assigned to the Smyrna terminal, including Garrison, that they could designate whether they wished to follow the work to Cassens or stay with Allied and seek work at another terminal. (7a) Even though he had not worked at Smyrna for nearly four years, Garrison advised Allied that he wanted to follow the work to Cassens and sent confirming letters to the business agent for Local 327. Garrison's letters were both signed "Received" by Cassens' Smyrna terminal manager.[3] Garrison received notice from Allied that based upon his decision to transfer to Cassens, his name was being removed from Allied's seniority list.

On June 7, 1996, approximately nineteen months after Garrison submitted his transfer election forms, he obtained a medical release from his doctor permitting him to return to work. When he contacted Cassens inquiring into when he could begin work, Cassens informed him that his name did not appear on Cassens' Smyrna seniority roster. (9a) Garrison then discussed his situation with

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[2] Under NMATA, Art. 5, § 1 "'Dovetail seniority' is a term that is applied when two or more seniority lists are merged or combined with a single seniority list which recognizes the terminal seniority date of each employee. The list is arranged by terminal seniority date with the most senior employee at the top.

[3] Cassens initially denied receiving these letters but later qualified its position. (10a) The arbitrators ultimately ruled in Garrison's favor on this issue. (14a)

Jimmy Neal, Local 327's business agent. Neal indicated that he agreed with Garrison's case for being placed on Cassens' seniority roster. (10a) Garrison submitted a grievance to that effect through Neal and Local 327. (10a)

The parties' inability to reach an acceptable resolution to Garrison's grievance resulted in the matter being submitted for arbitration. Neal docketed the grievance with the Southern Area Automobile Transporters Grievance Committee to be addressed at its August 1996 meeting in New Orleans, Louisiana. Garrison did not attend this proceeding, although Neal was present on his behalf. During the proceeding, Cassens reasserted its position that it did not have a contractual obligation to Garrison. In addition, for the first time, Cassens took the position that Garrison's seniority transfer opportunity had expired because he had not reported to work at Cassens within 30 days of the transfer opportunity as required by a "30-day rule" established in prior grievance cases. Garrison had not been advised of such a rule at the time of the reassignment of the Smyrna work to Cassens. (9a) Garrison contends that Neal did not inform him that Cassens had raised the defense of the 30-day rule at the Southern Area proceeding. (11a)

Garrison's case was referred to the National Joint Standing Seniority Committee (the "NJSSC") in Dana Point, California and scheduled to be heard on November 5, 1996. In preparing for this proceeding, Garrison and Neal kept in constant contact. They had several meetings and spoke on the phone almost every day. During this preparation stage, Garrison focused exclusively on trying to prove that he properly notified Cassens of his intentions to follow the Nissan work. Ultimately, Garrison forwarded

to Neal a ten-page, ninety-seven paragraph typed presentation with twenty-eight exhibits for the upcoming arbitration. Neal reviewed the presentation and thought that it was one of the best he had ever seen. (12a)

Approximately 48 hours before the proceeding, Neal, Garrison, and a Cassens representative met to exchange documents and information. Cassens gave Neal and Garrison seven prior joint arbitration committee decisions that it intended to use in support of Cassens' 30-day rule defense. Garrison contends that this was the first time that he was made aware of the existence of a 30-day rule. Garrison and Neal reviewed these decisions and decided that they were not applicable or were distinguishable from the circumstances involved in the instant matter. Neal failed, however, to realize or explain the potential significance the 30-day rule could have on Garrison's grievance. Consequently, no rebuttal – either by Neal or Garrison – was prepared on the issue of the 30-day rule. (12a)

In presenting Garrison's grievance to the NJSSC, Neal introduced Garrison to the committee and read Garrison's grievance into the record. Garrison, however, at his own insistence assumed primary responsibility for presenting his grievance to the committee. (26a) Garrison read a prepared statement and introduced exhibits in support of his case. Neither Neal nor Garrison made any mention or otherwise tried to obviate any argument regarding the 30-day rule. Cassens' representative handed committee members copies of arbitral precedent that he believed supported Cassens' position that "a man has 30 days from the date of the transfer [in] which he must make himself available." In rebuttal, Neal did not address the 30-day rule but Garrison raised a specific challenge to its applicability. (13a, 26a) In its final response, Cassens

more forcefully fleshed out its position on the applicability of the 30-day rule. (14a)

Following this hearing, the NJSSC issued its decision denying Garrison's request for employment with Cassens. The NJSSC found that "[p]rior decisions of this Committee require that employees who follow their work . . . make themselves available for work within 30 days after expressing their desire to do so." Because Garrison had not made himself available to work for Cassens during the applicable 30-day period, the NJSSC found that his transfer rights were extinguished. (14a)

Garrison then initiated the action giving rise to this case. In the course of the litigation, Garrison became aware of a decision of the NJAC that presented a similar issue to that involved in Garrison's case that had not been brought to the committee's attention. In that decision in May 1992, Cassens had asked the NJAC for guidance as to how long Cassens was obligated to offer work in a new operation at Avon Lake, Ohio to a driver from another company, E & L, then on a leave of absence due to an on-the-job injury. (43a-49a)[4] The NJAC did not mention a 30-day rule and determined that the E & L employee was to be deemed as transferred and hold seniority at Avon Lake. (15a)

All defendants except Cassens were dismissed from the lawsuit by motion or settlement. The case then

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[4] Garrison's presentation of the Avon Lake decision in the Appendix intersperses his own emphases and comments into the text of the decision. The original decision contained no boldface and no footnotes, both of which have been added by Garrison contrary to Rule 14(i).

proceeded to trial. At the conclusion of Garrison's case in chief and again at the close of trial, Cassens moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b). The court denied the motion and submitted the case to the jury. The jury found in favor of Garrison and awarded $408,885 in compensatory damages, allocating seventy-five percent of liability to Cassens and twenty-five percent to Local 327. It also awarded $500,000 in punitive damages against Cassens. Thereafter, Cassens renewed its Rule 50(b) motion, which was again denied by the court. (82a-87a) Cassens then moved for a new trial under Fed. R. Civ. P. 59, which also was denied.

The Court of Appeals reversed the district court's ruling denying Cassens' Rule 50(b) motion and held that the evidence presented to the jury was insufficient to support a finding of liability. (18a) The Court noted that a union member seeking relief from a grievance arbitration decision must show both the breach of a collective bargaining agreement by the employer and the breach of the duty of fair representation by the union. (18a) If the union member does not demonstrate both violations, his claim cannot succeed. (19a) The Court held that the applicable standard was established by *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991). That standard held that an employee must demonstrate that the union's actions or omissions during the grievance process were arbitrary, discriminatory, or in bad faith and that union's actions were so far outside a wide range of reasonableness as to be irrational. (19a) [citing *O'Neill*, *supra*, at 499 U.S. 67; *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); and *United Steel Workers of Am. v. Rawson*, 495 U.S. 362, 372-73, 376 (1990).]

Applying this standard to the actions of Garrison's union representative, the Court of Appeals held that the

claimed defects in representation by Neal amounted at most to negligence. The Court characterized Neal's actions as miscalculations of strategy and errors in judgment. (24a) It stated that his handling of the case did not rise to the level of irrationality or extreme arbitrariness necessary to establish a breach of the duty of fair representation under the *O'Neill* principles. (22a) The Court of Appeals thus found that the evidence viewed most favorably to Garrison was insufficient to support a finding of liability based on a breach of the duty of fair representation. (27a)

REASONS FOR DENYING THE PETITION

Nothing about this case warrants the Court's attention. The case arises in a settled area of the law, there are no conflicts between the Circuits concerning the manner in which the law is being applied, and there is nothing to distinguish Petitioner's situation from the broad range of employee grievances which are routinely presented and decided by non-lawyers in the context of collective bargaining agreements. Petitioner's only request for a change in the established jurisprudence concerning review of grievance arbitration determinations is to propose that the Court abandon the one sentence *Vaca v. Sipes* rule it has followed for the past 35 years and substitute a three-factor, 13-subfactor test focusing on the particular procedures of the automotive hauler collective bargaining agreement. Petitioner cites no court decisions as ever having adopted or even considered this test, and it would appear that the petition itself is the first instance in which this test ever has been articulated.

The petition otherwise requests nothing more than an evaluation by this Court of the manner in which the Court of Appeals applied the settled precedents of grievance arbitration law to the particular circumstances of the Petitioner's grievance. At best, such an argument is nothing more than a claim of misapplication of a properly stated rule of law which is not appropriate for a grant of certiorari. (See Rule 10) As noted above, there is no conflict between the circuits as to the appropriate manner in which this Court's determinations concerning the duty of fair representation are being applied.

I. No Meritorious Dispute as to Federal Law.

Petitioner has presented no basis for any further discussion by this Court of its definition of the duty of fair representation promulgated more than 35 years ago in *Vaca v. Sipes*, *supra*, 386 U.S. 171. As explained in *Vaca* and its progeny, union members who claim that their unions failed to provide fair representation in the grievance process are entitled to pursue a judicial remedy only if they establish that the union's conduct was "arbitrary, discriminatory, or in bad faith". *Vaca v. Sipes*, *supra*, at 386 U.S. 190. This Court has noted that a clear congressional policy favors resolution of labor disputes by arbitration. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562 (1976). This congressional policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement are given full play. *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960). Courts are not to usurp those functions which collective bargaining contracts have properly entrusted to an arbitration tribunal. *Id.* at 569. Given the great deference to arbitration for the resolution

of industrial disputes, courts generally will not disturb the finality of arbitration awards. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987).

This Court and the Courts of Appeal have provided numerous explanations as to appropriate standards for applying the tests set forth in *Vaca v. Sipes*. With respect to the issue of whether a union's conduct toward a member of the bargaining unit was arbitrary, this Court held in *Air Line Pilots Ass'n Int'l v. O'Neill*, *supra*, 499 U.S. at 67, that

> * * * a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness" * * * as to be irrational. *Id.* at 67.

With respect to the issue of whether a union's actions were in bad faith, this Court held in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), that bad faith exists only when the union's behavior consists of "fraud, deceitful action or dishonest conduct". *Id.* at 299. Since the *O'Neill* decision in 1991, this Court has revisited its standard concerning arbitrariness only once[5] and has not felt compelled to make any mention whatsoever of its standard regarding bad faith. The Courts of Appeal, however, apply these doctrines repeatedly and with little conflict. See, e.g. *Black v. Ryder/PIE Nationwide*, 15 F.3d 573, 585 (CA 6 1994); *Dushaw v. Roadway Express*, 66 F.3d 129, 133 (CA 6 1995), *cert. den.*, 517 U.S. 1120 (1996); *Walk v. PIE*

[5] *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998) (applying standard).

Nationwide, 958 F.2d 1323 (CA 6 1992); *Mock v. T.G. and Y. Stores Co.*, 971 F.2d 522, 531 (CA 10 1992).

Petitioner does not allege that there is any conflict in the decisions of the Courts of Appeal applying the *O'Neill* and *Lockridge* criteria which necessitates a grant of certiorari by this Court. Compare, Rule 10(a) Petitioner rather suggests in effect that the circumstances of his own case in and of themselves require the Court to abandon the *O'Neill* and *Lockridge* tests and substitute a three-factor 13-subfactor test which Petitioner labels the "Foot-stool of Integrity" (Petition at 13, 89a-92a[6]).

Petitioner cites no judicial authority for any of the elements contained in his proposed test. Rather than following this Court's statement in *O'Neill* that courts should not "sit as a super legislature"[7] to prescribe the details of a union's representation duties, Petitioner lists thirteen specific steps which he alleges a union is required to take in order to fairly represent the interests of a union member. These proposed requirements include providing the union member with a written identification of every article and section of the collective bargaining agreement that are relevant to the charges brought against the member (90a), providing a copy of the collective bargaining

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[6] While Petitioner suggests that his test is supported by *Hines v. Anchor Motor Freight, Inc.*, *supra*, 424 U.S. 554, *Hines* holds clearly that the "minimum levels of integrity" referred to by Petitioner are met when a union's conduct is found not to fall within the prohibited categories of arbitrary, discriminatory, or bad faith action established in *Vaca v. Sipes*, *supra* at 386 U.S. 190. *Hines v. Anchor Motor Freight*, *supra* at 424 U.S. 571.

[7] *Air Line Pilots Ass'n Int'l v. O'Neill*, *supra* at 499 U.S. 78.

agreement with a computer search engine (91a), providing a complete listing of all prior arbitration committee decisions with a search engine (91a) and requiring that the union insist that all procedures governing grievances in a contract be followed in every grievance proceeding. (91a)

The test proposed by Petitioner assumes that all collective bargaining arbitration procedures rely on committee decision precedents, that all grievance procedures require advanced notice of company charges, and that all grievance mechanisms used fixed rules of procedure. Petitioner advances no reason why this Court should consider abandoning 35 years of settled fair representation precedents to consider a proposal for micro-managing a union's representation of its members which is articulated in the Petition for the first time anywhere.[8]

II. Court of Appeals Decision Properly Applies Applicable Law.

The Court of Appeals decision is in accordance with this Court's holdings regarding the duty of fair representation. There is no merit to Petitioner's contention that the test for identifying arbitrary action set forth in *O'Neill* applies only to the specific *O'Neill* factual setting involving representation in contract bargaining. To the contrary, a primary holding of *O'Neill* was that the then settled law

[8] The Petitioner's proposed test was not set forth in any of Petitioner's briefs or arguments below. The term "Footstool of Integrity" does not appear in any electronically reported court decision.

applying *Vaca v. Sipes* principles to contract administration would be extended to cover the contract negotiation issues involved in *O'Neill*. *Air Line Pilots Ass'n Int'l v. O'Neill*, *supra*, at 499 U.S. 77. *O'Neill* holds specifically that the prohibitions against arbitrary, discriminatory,[9] and bad faith conduct announced in *Vaca v. Sipes* apply to a union in its contract administration, contract enforcement, and negotiating capacities. *Id.*

The Court of Appeals properly concluded[10] that the union's representation of Petitioner did not fall "so far outside a 'wide range of reasonableness' * * * that it [was] wholly 'irrational' or 'arbitrary' ". *Air Line Pilots Ass'n Int'l v. O'Neill*, *supra*, at 499 U.S. 78. Of the specific defects in representation alleged by Petitioner, the claim that union representative Neal failed to tell Petitioner about Cassens' 30-day rule argument when it was first raised in August, 1996 is negated by the fact that Petitioner admits knowing of Cassens' 30-day rule defense in advance of the final grievance hearing in November, 1996. (12a) Cassens provided both Petitioner and Neal with advance copies of arbitration decisions containing the 30-day rule. Petitioner

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[9] Petitioner does not allege that the union represented him in a manner that was discriminatory.

[10] The Court of Appeals determination under Fed. R. Civ. P. 50 properly held that as a matter of law, the evidence viewed most favorably to Petitioner was insufficient to support a verdict in Petitioner's favor. Given this Court's clear explanation of the standards for fair representation, the Court of Appeals properly viewed Petitioner's evidence in its most positive light and determined that any factual complexities in the details of Petitioner's grievance proceeding were not material to evaluating whether the union's representation of petitioner was either arbitrary or in bad faith. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, at 250, 251-2 (1986).

and Neal reviewed them and concluded that these cases were inapplicable or distinguishable from the circumstances involved in Petitioner's case. (12a) There is no reason to assume that Petitioner would have reached a different conclusion if he had reviewed these cases earlier. Petitioner could have sought an adjournment after reviewing the cases but elected rather to proceed with the hearing.[11]

The possibility that a different strategy to seek an adjournment and do further legal research might have allowed the union to find the subsequently discovered Avon Lake decision also does not make the union's actions irrational or grossly unreasonable. Even if the arbitrators had been presented with the Avon Lake decision, it is by no means certain that they would have elected to apply the result of that decision and ignore the 30-day rule established in the other arbitration decisions which Cassens presented.[12]

The Avon Lake decision involves a markedly different fact situation than the one involving Petitioner. The Avon Lake decision involved staffing to serve a new operation rather than a change of carriers at an existing facility. (44a) It involved a "rail ramp" operation that was separable from the operation at the new plant facility. (46a) As

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[11] R.281, Garrison at TR 425-428, Neal at TR 506-508. (All references in this Brief to the record below contain the trial court docket entry number followed by a page reference or exhibit number.)

[12] R.281, 282, Clark at TR 553-567; R.236, trial exhibits AAA, BBB, CCC, DDD, FFF, GGG, and HHH. [References to a 30-day rule in these decisions are set forth in the Appendix to this Brief (1b-3b)]

the decision suggests, where new plants and new operations are involved, delays in starting dates often occur (46a) which make it impractical to insist that employees on leave must report for work by a fixed date. Ample reasons exist for distinguishing the arbitrators' decision in Avon Lake from the circumstances involved in Petitioner's grievance.

The Avon Lake decision does not disavow the 30-day rule; it merely does not mention it. (43a-49a) Six of the decisions presented by Cassens, however, state affirmatively that drivers in a wide range of circumstances are required to make themselves available for work within 30 days of a transfer opportunity or work reorganization in order to preserve their transfer rights or seniority. (1b-3b) These cases were issued both before and after the Avon Lake decision. Given these facts, there is no assurance that arbitrators would have found the Avon Lake case to be the applicable precedent and rejected the precedent cases presented by Cassens.

As the Court of Appeals noted, at the time Petitioner and Neal decided to go forward and seek to distinguish these cases rather than conducting further legal research, they had no knowledge what that research might produce. (23a-25a) If they felt that Cassens' cases were weak, they might justifiably have decided to attack those cases immediately rather than allowing more time for both sides to search for clearer precedent. Union representatives are not lawyers (20a) and even lawyers making such a decision would not be found to have acted irrationally or with

gross negligence. As this Court has noted, union actions[13] in the heat of representing their members are by no means irrational simply because they turn out in retrospect to have produced an unfavorable result. *Air Line Pilots Ass'n Int'l v. O'Neill*, *supra*, at 499 U.S. 79.

Petitioner similarly does not demonstrate any action by the union which falls within this Court's accepted definition of the "bad faith" sufficient to establish a breach of the union's duty of fair representation. As set forth previously, a union's representation of an employee falls into the category of bad faith only where the union engages in "fraud, deceitful action, or dishonest conduct" toward the employee. *Motor Coach Employees v. Lockridge*, *supra*, at 403 U.S. 299. As this standard suggests, an essential element of "bad faith" in the context of unfair representation is misleading conduct or deception which is *intentional* on the part of the union. *Spellacy v. Air Line Pilots Ass'n Int'l*, 156 F.3d 120, 126 (CA 2 1998), *cert. den.*, 526 U.S. 1017 (1999); *Baxter v. United Paperworkers Int'l Union*, 140 F.3d 745, 747 (CA 8 1998); *Mock v. T.G. and Y. Stores Co.*, *supra* at 971 F.2d 531.

Petitioner cites no evidence that Neal defrauded, deceived, or lied to Petitioner. The listing of examples of bad faith contained in the Appendix to the Petition alleges no such conduct. (105a-115a) The items included in this listing consist rather of the same hindsight criticisms of Neal's representation of Petitioner which support

[13] Petitioner's criticism of Neal's lack of vigor or emphasis in his closing arguments in favor of Garrison similarly does not rise to the category of grossly unreasonable or irrational action.

Petitioner's claim of arbitrariness.[14] The evidence moreover shows a complete lack of any basis for assuming that Neal had any reason for taking steps to cause Petitioner's grievance to fail. The evidence shows that prior to the grievance, Neal had never met Garrison (R.158, Garrison at TR 122-123); that Garrison had never opposed Neal or any other officer of Local 327 in any internal elections; that Garrison had never run for Union office himself (R.158, Garrison at TR 45-48); that Garrison had never filed any charges against Local 327 (R.158, Garrison at TR 206) and that no hostility or animosity existed between Garrison and the union (R.158, Neal at TR 54). Given these undisputed facts, there was absolutely no basis for finding that Neal or the union breached the duty of fair representation by bad faith conduct as defined by the decisions of this Court.

[14] The presence of versions of the 30-day rule in six of the arbitration decisions submitted by Cassens (1b-3b) negates the assertions throughout the petition that the 30-day rule was a "fake" which the Union failed to properly challenge.

CONCLUSION

For the reasons set forth, Respondent asks that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Excepts from Arbitration Decisions Submitted To Joint Arbitration Committee By Cassens Transport Company

Exhibit AAA (January 9, 1979)

Based on the facts in this case, the claim of C. Smith is denied, however, in the future, any employee who is off sick or injured at the time a bid under seniority transferability is posted will be allowed to bid and hold that bid if the employee will be available within 30 days from the posting of the bid.

Exhibit BBB (April 25-29, 1983)

Motion made, seconded and carried that based upon the facts presented, the claim of the grievant is denied and, therefore, his seniority date of September 24, 1982 is his proper seniority date. The Committee further finds that, in the future, any employee who is off sick or injured at the time additional help becomes available under the additional help provisions of the contract, said employee will be permitted to transfer under additional help provided the employee becomes available within thirty (30) days from the date that additional help became available.

Exhibit CCC (October 21-23, 1991)

Based upon the facts presented, the request of Harold Henry is denied since he was not available to transfer within the requisite thirty (30) day period; and moreover, under any circumstances he is untimely in his request to bid the Smyrna terminal.

Exhibit DDD (June 25, 1993)

Because this transaction involves a partial closing of a terminal, as opposed to a total closing, the Twin Oaks driver and garage personnel presently on medical-related leaves of absence electing to transfer to Annapolis Junction shall have thirty (30) days after the opportunity is presented to make themselves available at Annapolis Junction in order to retain their position under this decision. If they fail to make themselves available within the thirty (30) day period, they shall not have future rights to transfer to Annapolis Junction under this decision.

Exhibit FFF (November 1-3, 1988)

(a) Based on the prior National Committee decision that an employee must be able to assume the bid work within 30 days of the offer of work, to hold their spot and that each of these grievants are still under doctors care, the protest is denied.

(b) Further, the Committee held that these grievants have not lost their Norwood, Ohio terminal seniority.

Exhibit GGG (February 21-22, 1984)

The panel in executive session, motion made, seconded and carried that based upon facts presented which indicated that the vacancy bid was in accordance with the seniority transferability agreement; that James Bolden was not available for work for thirty (30) days subsequent to the effective date of the bid as the result of a heart attack; and, a ruling on a similar case made by the National Committee requiring that an employee must be available and qualified within thirty (30) days of the

seniority transferability bid to be eligible for the vacancy; therefore, the claim of James Bolden for the yard position is denied. Cost split.